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University of Alberta

Canada Instaurata 1867 – Imperial Perceptions of Provincial Autonomy:
Rereading the 1867 Confederation Settlement

by

Jordan Birenbaum ©

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Canada

Abstract

The orthodox thesis that Canadian Confederation was intended to create a highly centralized "quasi-federal" union with subordinate provincial governments is largely incorrect. Instead, the Colonial Office – which was the final arbiter and manufacturer of the 1867 settlement – was presented with a highly decentralized proposal for colonial federation and obligingly constructed the BNA Act as such. The consistent failure to understand this in the twentieth century stems from a conceptual shift in our understanding of sovereignty and constitutionalism that rapidly rendered the language of the BNA Act archaic, yet it was consistently read and interpreted as if it were modern. The 1867 Act is unique in that it attempted to combine the British tradition of theoretically unlimited government with a federal system. Thus, the Judicial Committee of the Privy Council's (JCPC) rulings that made Canada a decentralized and co-ordinate federation were actually a reconfirmation – and not an abomination – of the original intent behind Confederation that had been abused by centralizing federal governments.

O! it is excellent to have a giant's strength, but it is tyrannous to use it like a giant.

William Shakespeare
Measure for Measure
Isabella, II.ii.108-110

Canada Instaurata 1867, Juventas et Patrius Vigor.
Confederation Medal (reverse), 1867. Reproduced from the National Library of Canada's website (www.nlc-bnc.ca).

This the medallion struck upon Queen Victoria's Permission to commemorate Canadian Confederation. The medallion reads "Canada Instaurata 1867, Juventas et Patrius Vigor" which translates as "Canada Reorganized 1867, Youth and Ancestral Vigour." The image portrays Britannia (the personification of the British Empire) giving Confederation to Ontario (with sickle), Quebec (with paddle), Nova Scotia (with mining spade) and New Brunswick (with timber axe).

Résumé

La thèse orthodoxe selon laquelle la confédération canadienne avait l'intention de créer une union fortement centralisée ou "quasi-fédérale" avec des gouvernements provinciaux subalternes est en grande partie incorrecte. Au contraire, le Ministère britannique des Colonies, qui était l'arbitre final de l'accord de 1867, a eu affaire à une proposition fortement décentralisée pour la fédération coloniale et a donc été contraient à rédiger L'Acte de l'Amérique du Nord britannique (AANB) suivant ce principe. Au cours du 20ème siècle les variations dans les conceptions de la souveraineté et du constitutionalisme ont rapidement rendu la langue de l'AANB archaïque, pourtant on l'a lu et interprété uniformément comme s'il s'agissait d'un texte moderne. D'où le malentendu entre les intentions présumées et réelles des législateurs. L'Acte de 1867 est unique parce qu'elle a essayé de combiner la tradition britannique du gouvernement théoriquement illimité avec un système fédéral. Ainsi, les décisions du Comité judiciaire du Conseil privé à Londres qui ont fait du Canada une fédération décentralisée et coordonnée étaient réellement une confirmation, et pas une distorsion, de l'intention originale de la confédération, qui avait été abusée par des gouvernements fédéraux centralisateurs.

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My widest and greatest thanks must go to my thesis supervisor, Dr. Julián Castro-Rea. The existence of this thesis is mortally dependent upon him, who helped to germinate the idea and who thereafter enthusiastically encouraged and supported the project all the way to its conclusion.

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Glossary

*Some of the following terms are adapted from either Henry Campbell Black, *Black's Law Dictionary: Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern* revised 4th edition (St. Paul, Minn: West Publishing Co, 1968) or Daniel Williman, *Legal Terminology: An Historical Guide to the Technical Language of Law*, (Peterborough, Ont.: Broadview Press, 1986).

aliterate. A society that does not make use of written language.

BNA Act. Refers to the *Constitution Act, 1867* (as defined by "Modernization of the Constitution" in the *Schedule to the Constitution Act, 1982*[1]) in its initial incarnation; that is the *British North America Act, 1867*, 30 & 31 Victoria, c. 3 (UK) without any amendments. This nomenclature is preferred in this paper because of its historical consistency and it differentiate the *Constitution Act, 1867* in its present-day amended form from its original un-amended form. As well, this term is preferred to differentiate the *Constitution Act, 1867* from the *Constitution Act, 1867* 30 & 31 Victoria, c. 3 (UK), as the latter is an Act of the Imperial Parliament which created a statutory colonial constitution for the colony of Queensland (which is now the State of Queensland, a constituent unit of the Commonwealth of Australia). See also "Constitution Act, 1867" as and see Appendix A.

British North America. Strictly, all British possessions north of the United States (thus, excluding West Indian British possessions). Generally used to refer to those possessions that were involved in the negotiations of the 1867 Confederation settlement; that is the provinces or colonies of Canada, New Brunswick, Nova Scotia, Prince Edward Island, and Newfoundland.

British Parliament. Refers to the Parliament of the United Kingdom of Great Britain and Ireland (United Kingdom of Great Britain from 1707 until 1801 and United Kingdom of Great Britain and Northern Ireland after 1922); its preferred usage is to refer to that Parliament acting in its capacity as the domestic Parliament for Great Britain.

CAC Act. *Commonwealth of Australia Constitution Act, 1900*, 63 & 64 Victoria, c. 12 (UK).

Canada East. Refers to the portion of the Province of Canada (1840-1867) that corresponds with Lower Canada or the Province of Quebec. Strictly used in its legal and historical sense.

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[1] Canada, *A Consolidation of the Constitution Acts, 1867 to 1982* (Ottawa: Dept. of Justice Canada, 2001), 79-82.

Canada West. Refers to the portion of the Province of Canada (1840-1867) that corresponds with Upper Canada or the Province of Ontario. In this paper it refers strictly used in its legal and historical sense.

central government. See "federal government."

CLVA. The *Colonial Laws Validity Act, 1865* 28 and 29 Victoria, c. 63 (UK). See Appendix A.

codified. A system of positive law promulgated by legislative authority.

Constitution Act. Refers to the *Constitution Act, 1867* consolidated with amendments. In 1867 the UK Parliament passed the *Constitution Act, 1867* 30 & 31 Victoria, c. 3 (UK), which was a statutory colonial constitution for the colony of Queensland. To avoid confusion, I prefer the contextual name for an Act. Thus, when referring to what is now called the *Constitution Act, 1867* and what was formerly the *British North America Act, 1867* before 1982, I prefer the term "BNA Act" and when contextually discusses the 1860s the term "Constitution Act, 1867" is used to refer to the colonial statutory constitution for Queensland.

constitutional. Any act that is consistent, authorized, and not conflicting with any conventional provision of the constitutional structure. This includes both codified ("written") and uncodified ("unwritten") elements of the constitution. See also "*intra vires*."

coordinate. Equal, of the same order, rank, degree, or importance; neither superordinate nor subordinate.

English Parliament. Refers to the Parliament of the Kingdom of England before 1707. See also "Westminster," "Home Government," "Imperial Parliament" and "British Parliament."

federal government. Refers to the central, general, or composite government of a federal union.

federal union. In the colonial context, an inter-colonial union which would have two constitutionally guaranteed tiers of government, a general government and local or provincial governments.

General Government. Refers to the central or federal government of the federal union proposed by the Quebec Resolutions.

Home Government. Refers to the government or ministry of the Imperial Parliament or Parliament of the United Kingdom of Great Britain and Ireland.

Imperial Parliament. Refers to the Parliament of the United Kingdom of Great Britain and Ireland (United Kingdom of Great Britain before 1801 and United Kingdom of Great Britain and Northern Ireland after 1922) acting in its capacity as the supreme legislative authority of the British Empire. See also "Westminster," "Home Government," "British Parliament," and "English Parliament."

incorporating union. See "legislative union."

inferior. An act or an obligation that is of less importance to another act or obligation. See also "subordinate."

intra vires. Latin; literally "within its powers." Any act that is consistent, authorized, and not conflicting with the strict, codified, provisions of a constitutional document; consistent with the "black-letter of the law." See also "constitutional."

JCPC. The Judicial Committee of the Privy Council. The institution that acted as Canada's court of final appeal in constitutional cases until 1949. Technically it was not a true court, but merely a body that rendered advice to the crown on matters arising from legal conflicts in Her Majesty's overseas possessions. However, it acted and was treated exactly as though it was a court for the entire period in which it entertained appeals from Canadian courts.

legislative union. In the colonial context, an inter-colonial union which would have only one constitutionally guaranteed tier of government.

local government. Refers to the colonial or provincial governments.

Lower Canada. Strictly, the Colony of Lower Canada (1791-1840); generally, refers to that territory subsequent to 1840 as it was the identity of the inhabitants thereof.

Patriation Reference. *A-G. Man. et al. v. A-G. Can. et al. (Re Constitution of Canada)*, September 28, 1981.

postcede. To come, exist, or occur subsequent in time.

precede. To come, exist, or occur before in time.

salus populi. Latin; literally, the 'safety of the people;' the 'needs,' 'power,' or 'sovereignty' of the people.

subordinate. Placed in a lower order, class, or rank; occupying a lower position in a regular descending series. See also "superordinate," "coordinate," "superior," and "inferior."

superior. An act or an obligation that is of greater importance to another act or obligation. See also "superordinate."

superordinate. Placed in a higher order, class, or rank; occupying a lower position in a regular ascending series. See also "subordinate," "coordinate," "superior," and "inferior."

ultra vires. Latin; literally "beyond its powers." Any act that is inconsistent, conflicts, or violates the strict, codified, provisions of a constitutional document; inconsistent with the "black-letter of the law." See also "unconstitutional."

uncodified. An authoritative system of law that rests on convention and thus has not been

unconstitutional. Any act that is inconsistent, conflicts, or violates any conventional provision of the constitutional structure. This includes both codified ("written") and uncodified ("unwritten") elements of the constitution. See also "*ultra vires*."

union. In the colonial context, any inter-colonial whether federal or legislative. See also "legislative union" and "federal union."

Upper Canada. Strictly, the Colony of Upper Canada (1791-1840); generally, refers to that territory subsequent to 1840 as it was the identity of the inhabitants thereof.

Westminster. The Palace of Westminster is the home of both Houses of Parliament in the United Kingdom. Although the term is used variously to refer to the "Imperial Parliament" and the "British Parliament" its preferred usage is to refer to it supreme sovereign nature in both the polity of the United Kingdom as well as the British Empire.

Chapter 1

Introduction

> *Quand nous [Anglais] faisons une Révolution, nous ne détruisons pas notre maison, nous en conservons avec soin la façade et derrière cette façade, nous reconstruisons une nouvelle maison. Vous, Français, agissez autrement: vous jetez bas le vieil édifice et vous reconstruisez la même maison avec une autre façade et sous un nom différent.*[1]

Ironically with the 1982 patriation, the francophone province of Quebec defended English constitutionalism whereas English Canada largely adopted French constitutionalism. The 1960s, as with so many other things, was a revolutionary period of Canadian constitutionalism, politics, and nationalism; yet these revolutions took place behind a stable constitutional façade. The 1960s not only ushered in the Quiet Revolution in Quebec which resulted in the rise of a secular Quebec nationalism, but the 1960s marked the acceleration of a new Anglophone-centred discretely pan-Canadian nationalism. Both nationalisms embraced modernity with gusto and set out to repudiate and replace older and – what were perceived as – colonial nationalisms.

Whereas the rise of Quebec nationalism culminated in the failed 1980 referendum on sovereignty-association, the new pan-Canadian nationalism culminated in the 1982 Patriation of the constitution with the addition of the *Charter of Rights and Freedoms*. The 1982 patriation ripped a hole in the façade of Canada's constitution to reveal deep divisions over substantive constitutional changes:

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[1] "When we [the British] have a Revolution, we do not destroy our house, instead we carefully preserve the façade and behind this façade, we rebuild a new house. You, French, engage in revolutions differently: you easily tear down the old building, but you rebuild the exact same house with merely different façade under a different name." (My translation). Campbell-Bannerman to the French Ambassador to the Court of St. James, M. de Fleuriau, quoted in K. C. Wheare, *The Statute of Westminster and Dominion Status* (Oxford: The Clarendon press, 1938), 9-10.

Canadians had been building different constitutional houses behind a common façade. In 1982 Pierre Trudeau attempted to unify these various houses into a single body through constitutional patriation. Whether he succeeded in doing so seems unlikely in the face of the continued threat of Quebec separatism (not to mention the continued grievances of Aboriginals).

Although most found the creation of the separatist *Bloc Québécois* caucus as "Her Majesty's *Loyal* Opposition" in 1993 to be highly ironic, it is not necessarily so. Etienne-Pascal Taché's comment in 1846 that "if ever this country ceases to be British, the last cannon shot to uphold British power in America will be fired by a French Canadian," rings true if one replaces "British power" with "the British constitution."[2] In its constitutional struggles, Quebec has been the staunchest defender of Canada's British constitutionalism. Of all the legislative bodies in Canada, the National Assembly has probably remained the most faithful to the conventions of the English Parliament[3] and it has been the Quebec government – ironically with its civil code – that has fought hardest to maintain Canada's "unwritten" conventions against the rise of French and American style constitutionalism that stresses the exhaustiveness of a single written document. Yet, Quebec has not been the guardian of Canada's 1867 federal constitutional settlement, merely the guardian of what it sought from that compact. Since Quebec has most consistently maintained its ideal, its present-day views of Confederation have remained the most faithful to the original compact. However, the sharp divergences over the constitution that has developed in Canada are not the result of different groups developing different conceptions of Confederation from a single common understanding, but instead arise because, at inception, the Confederation compromise meant radically different things to different groups.[4] As Justice Louis-Philippe Pigeon would comment in 1951:

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[2] The original French read, "si jamais ce pays cesse un jour d'être britannique, le dernier coup de canon tiré pour le maintien de la puissance anglaise en Amérique le sera par un bras Canadien." See Andrée Désilets, "TACHÉ, sir ÉTIENNE-PASCHAL," Dictionnaire biographique du Canada en linge, accessed 2004-04-06 <http://www.biographi.ca/FR/ShowBio.asp?BioId=38858>.

[3] See Gaston Deschênes, *The Assemblée nationale: its organization and parliamentary procedure* Third Edition (Québec: Assemblée nationale, 1983),16-17, 19-25, 34-36.

> *The B.N.A. Act is not the expression of the intention of one man, whose ideas might perhaps be gathered from extrinsic evidence with a reasonable degree of certainty, [but it] is the expression of a compromise between many men holding different and opposed viewpoints.*[5]

II

In general, the understanding of the original intent behind Confederation has coalesced into two major streams of thought defined – like so many other aspects of Canadian life – into the "two solitudes" of the dominant English-Canadian and French-Canadian (Québécois) schools.

The French-Canadian understanding of the Confederation compact was that a confederal pact was created between French-Canadians (in Lower Canada) and English-speaking Canadians in the rest of the Dominion. In this arrangement Lower Canada exchanged its equal representation with the more populous Upper Canada from the old united Province of Canada for Representation-by-Population in a new

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[4] In this paper I will not discuss the Aboriginal aspect of Canadian constitutionalism because this paper focuses on the 1867 federal compromise to which Aboriginals were not a party to. Although this compromise was to significantly affect them, Aboriginals, in the few years leading to Confederation, had – to the best of my knowledge – little or no part in effecting it.

[5] Louis-Philippe Pigeon "The Meaning of Provincial Autonomy" *Canadian Bar Review* 29 (1951), 1128.

British North American union in exchange for its own autonomous legislature that would protect Lower Canada's language, religion, and culture from assimilation into the wider Anglo-protestant union. Although the new union was envisioned to possibly encompass the whole of British North America, it was essentially understood in French Lower Canada as a compromise made within the political atmosphere of the old united Province of Canada. The agreement was dualistic, French Canada making a one-to-one agreement with the outside world which was entirely "British" – whether the British in Upper Canada, the Maritimes, or London. With the creation of the new Dominion, French-Canadians largely remained aloof (and were effectively barred) from many of the institutions in the new Dominion, remaining active in only those institutions which directly affected cultural life within Quebec – Parliament and the Courts. Many of the powers granted to the new general government were of little concern for maintaining French-Canadian culture in Quebec: maritime issues, high commerce, aliens, and statistics among others. Thus, outside of Parliament and the Courts, most Dominion institutions[6] became solidly anglophone and the government in Ottawa came to discretely represent all of English-Canada, simply because it did not generally represent French-Canada. For Quebec, Confederation originated and developed dualistically between Ottawa and Quebec City. This understanding has been more recently well developed by A.I. Silver in *The French Canadian Idea of Confederation: 1864-1900*[7] as well as be Kenneth McRoberts in *Misconceiving*

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[6] Here I am referring mostly to bureaucratic departments.

[7] Arthur Isaac Silver. *The French-Canadian Idea of Confederation, 1864-1900* 2nd edition, (Toronto: University of Toronto Press, 1997).

Canada.[8] An older, but consistent, examination of this issue can be seen in Charles Bonenfant's *The French Canadians and the Birth of Confederation* .[9]

The historiography of the dominant anglophone conception of history is more prevalent in anglophone literature and dominates constitutional interpretation in history, political science, and law (partially due to numerical superiority of Anglophones).[10] This interpretation of Canada's constitutional compromise in 1867 holds that the system of government in the old Province of Canada had reached "deadlock" in 1864 and some sort of solution was necessary that balanced (the more numerous) Upper Canada's desire for "rep-by-pop" with Lower Canada's concern for guarding against assimilation. The solution was found by Canada "hi-jacking"[11] the 1864 Charlottetown conference on Maritime Union and converting the discussions into a broad union of all of British North America. Most authors on the subject have taken John A. Macdonald's proclamation as the gospel of the basic intent of all British North Americans in approaching Union:

> *Now, as regards the comparative advantages of a Legislative and a Federal Union, I have never hesitated to state my own opinions. I have again and again stated in the House, that, if practicable, I thought a Legislative Union would be preferable. I have always contended that if we could agree to have one government and one parliament, legislating for the whole of these peoples, it would be the best, the cheapest, the most vigorous, and the strongest system of government we could adopt. But, on looking at the subject in the Conference, and discussing the matter as we did, most unreservedly, and with a desire*

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[8] Kenneth McRoberts, *Misconceiving Canada: The Struggle for National Unity*, (Toronto: Oxford University Press, 1997).

[9] Jean Charles Bonenfant. *The French Canadians and the Birth of Confederation* (Ottawa: Canadian Historical Association, 1966).

[10] My approach to the English Canadian literature is indebted to Paul Romney's *Getting it Wrong: How Canadians Forgot Their Past and Imperilled Confederation* (Toronto: University of Toronto Press, 1999), 3-20.

[11] Frederick Vaughan, *The Canadian Federalist Experiment: from Defiant Monarchy to Reluctant Republic*, (Montreal: McGill-Queen's University Press, 2003), 53.

> *to arrive at a satisfactory conclusion, we found that such a system was impracticable. In the first place, it would not meet the assent of the people of Lower Canada, because they felt that in their peculiar position – being in a minority, with a different language, nationality and religion from the majority, – in case of a junction with the other provinces, their institutions and their laws might be assailed, and their ancestral associations, on which they prided themselves, attacked and prejudiced; it was found that any proposition which involved the absorption of the individuality of Lower Canada – if I may use the expression-- would not be received with favour by her people. We found too, that though their people speak the same language and enjoy the same system of law as the people of Upper Canada, a system founded on the common law of England, there was as great a disinclination on the part of the various Maritime Provinces to lose their individuality, as separate political organizations, as we observed in the case of Lower Canada herself. Therefore, we were forced to the conclusion that we must either abandon the idea of Union altogether, or devise a system of union in which the separate provincial organizations would be in some degree preserved.*[12]

This school of thought concludes that the system of union that was devised was a "quasi-federal" system which combined American federalism with the "Constitution similar in Principle to that of the United Kingdom."[13] It argues that the framers of Canada's constitution desired a highly centralized – almost legislative – union and that American federalism had been somewhat repudiated because of the contemporary American Civil War, so that model could not be followed. Thus, the federal veto[14] powers, the federal declaratory power, the federal appointment of provincial Lieutenant Governors, the exclusive federal control over the judiciary, the federal right to legislate for the "peace, order, and good government of Canada,"[15] and that "all the great subjects of legislation"[16] were exclusively granted to the federal government, are the litany of examples cited to show the nearly universal "evident intent" of the Confederation compromise. The number of significant authors who ascribe to this understanding are too extensive to list exhaustively. However, of primary importance is Donald Creighton who has been the "father" of post-war Confederation studies with a series of major works from *John A. Macdonald* (1952 and 1955), to *The Road to Confederation* (1964), and to *Canada's First Century 1867-1967* (1970). Although of primary importance, he was hardly the first major author to ascribe to this theory: William O'Connor's report to the Senate in 1939 (in preparation for creating a domestic amending formula) strongly adhered to this idea.[17] As well, even W.P.M. Kennedy[18] and Reginald Trotter[19] in the early years following the First World War subscribe to this idea. Suffice it to say that this is the ideal which pervades nearly all English-Canadian textbooks which touch upon the subject.

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[12] John A Macdonald from *Parliamentary Debates on the Subject of the Confederation of the British North American Provinces*, 3rd session, 8th Provincial Parliament of Canada (Quebec: Hunter, Rose & Co., Parliamentary Printers, 1865), 29.

[13] *British North America Act, 1867*, 30 & 31 Victoria, c. 3 (UK), Preamble. Hereafter referred to as the "BNA Act." See Appendix A.

[14] In this paper I use the term "veto" to refer to the Imperial and federal powers of "reservation" and "disallowance."

[15] BNA Act, Section 91. See Appendix A.

Further, the dominant anglophone interpretation is generally characterized as the legally or constitutionally valid interpretation even by those who have seen the French-Canadian dualistic model as the "moral" basis of Confederation in either its original conception and/or its present-day applicability to Canada's sociological and political makeup. Samuel LaSelva[20] and Alain Cairns[21] typify this approach, arguing that a decentralized and dualistic model of Canada better reflects Canada's sociological conditions and thus would make a better constitutional model for Canada, but that in its original intent Canada was designed as a highly centralized, uniform, "quasi-federal" state.

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[16] John A. Macdonald from *Parliamentary Debates,* 33.

[17] William O'Connor, *Report Pursuant to Resolution of the Senate to the Honourable the Speaker by the Parliamentary Counsel, relating to the Enactment of the British North America Act, 1867, Any Lack of Consonance between its terms and Judicial Construction of Them and Cognate Matters* (Ottawa, King's Printer, 1939).

[18] W.P.M. Kennedy, *The Constitution of Canada; an Introduction to its Development and Law,* (London: H. Milford, 1922). and W.P.M. Kennedy, *The Nature of Canadian Federalism* (Toronto: University of Toronto Press, 1921).

[19] R.G. Trotter, *Canadian Federation: Its Origins and Achievements: A Study in Nation Building,* (Toronto: Dent, 1924).

This idea has remained even to the present day. Peter Russell's thoughtful exposition of the origins of Canada's constitution back to the Glorious Revolution in *Constitutional Odyssey* (1992) maintained, nonetheless, this same ideal. As well, the most recent monograph on the subject, Frederick Vaughan's *Canadian Federalist Experiment* (2003) strongly adheres to this idea.

The 1990s did produce a few significant dissenting voices to the orthodoxy of highly centralized intent (among anglophone authors). The first of these was Robert Vipond's *Liberty and Community* in 1991; a work which carefully analyzed Ontario's 19th century "provincial-rights" movement to illustrate the decentralizing intent of certain "Fathers" (as well as to attack the conception that liberal-individualism and collective-rights are polar opposites).[22] Although not his concern, Tully's 1995 *Strange Multiplicity* indirectly attacks the centralizing orthodoxy by providing a solid foundation to decentralist arguments in Canada's common law tradition.[23] Finally, there is Paul Romney whose 1999 work, *Getting it Wrong* (which was a follow up to his 1992 article "The Nature and Scope of Provincial Autonomy"[24]), provided a significant attack on the centralist thesis. However, as Vaughan's recent *Canadian Federalist Experiment* clearly attests, this view has done little to temper the "quasi-federal" orthodox interpretation of the intent behind Canadian Confederation. Nevertheless, there is perhaps some hope of a dialogue of perspectives in this work, as it specifically attempts to counter Romney's interpretation[25] and does not simply entirely ignore it.[26]

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[20] Samuel V. LaSelva, *The Moral Foundations of Canadian Federalism: Paradoxes, Achievements, and Tragedies of Nationhood* (Montreal: McGill-Queen's University Press, 1996), 20-30.

[21] Alain Cairns, *Constitution, Government, and Society in Canada* (Toronto: McClelland and Stewart, 1988), 62-63.

[22] Robert Charles Vipond, *Liberty and Community: Canadian Federalism and the Failure of the Constitution* (Albany: State University of New York Press, 1991).

[23] James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995).

III

> *The details of one of the largest and most important measures which for many years it has been the duty of any Colonial Minister in this country to submit to Parliament.*[27]

It was with these words that Lord Carnarvon, who was Colonial Minister from July 1866 to March 1867, introduced the British North America Bill for second reading before the House of Lords on 19 February 1867. However, this speech in particular, and the general British attitude towards "*the details*" of Canadian federalism has lacked thorough examination. It has been only recently, with Ged Martin's 1995 *Britain and the Origins of Canadian Confederation: 1837-1867*, that a thorough examination of the role of the British in bringing about Union has been attempted. Yet, this work focuses on why the British wanted union and their expectations of this union, but does not attempt to address how the conception of "federalism" itself was understood by the British – it does not address the 'intent' of *The British North America Act, 1867*[28] as understood by the Colonial Office and British Officialdom.

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[24] Paul Romney, "The Nature and Scope of Provincial Autonomy: Oliver Mowat, the Quebec Resolutions and the Construction of the *British North America Act*," Canadian *Journal of Political Science*, vol. 25 no. 1 (March 1992).

[25] Vaughan, *The Canadian Federalist Experiment*, especially at 59.

[26] Surprisingly, however, Vaughan only makes reference to Romney's 1992 article – Romney, "Nature and Scope." – and neither cites nor lists in his bibliography Romney's much more expansive 1999 monograph on the subject – Paul Romney, *Getting it Wrong: How Canadians Forgot Their Past and Imperilled Confederation* (Toronto: University of Toronto Press, 1999). This is surprising because the work is constructed as though it is almost a direct criticism of Romney's thesis.

[27] Lord Carnarvon from Hansard United Kingdom, Parliament, *Debates*, 3rd Series, House of Lords, Vol. 185, p. 557 (19 February 1867).

The view of federalism from the Colonial Office is a perspective that helps to distil the varying arguments, conceptions, and intents of the "Fathers of Confederation" who did not hold uniform ideas of what the new union was to embody. The Fathers and the various debates reflect the divergent views of not merely four provinces, but of various pro- and anti-confederation forces. Everything from a strong, central, over-riding authority to an incredibly decentralized system, and numerous middle variations were envisioned by various "Fathers." There can be little doubt that John A. Macdonald, D'Arcy McGee, or Alexander Galt envisioned a strongly centralized union, but the accusation that men like Oliver Mowat "betrayed" their centralizing proclamations from 1864[29] seems a rather harsh and even unlikely conclusions. An alternate explanation, reflected in documentary evidence, is that men like Mowat, Cartier, and Langevin desired a de-centralized union with significant local control. Reflecting on Colonial Office views is critical because the Colonial Office was the common body to which to which the desires of the colonials would be explained, digested, and finally promulgated. The BNA Act is neither the Quebec nor the London Resolutions verbatim, but a statute that was reflected upon and written by the Colonial Office based upon those resolutions.

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[28] With the 1982 patriation of the Canadian Constitution, the "British North America, 1867, 30 & 31 Victoria, c. 3 (UK)" was renamed the "Constitution Act, 1867." For brevity and clarity when I am referring to the Act in a pre-1982 historical context I will call it the "BNA Act." Those occasions when I refer to the "Constitution Act, 1867 " I am referring to the Act in its present-day (*Constitution Act, 1867 to 1982*) incarnation.

[29] Donald Creighton, *Canada's First Century: 1867-1967* (Toronto: Macmillan of Canada, 1970), 47

It was one of John A. Macdonald's complaints that the BNA Act passed through Westminster as if it were a bill "to unite two or three English parishes."[30] Nonetheless one cannot approach the Colonial Office as a disinterested observer simply taking the Quebec and London Resolutions and the concerns of the delegates unbiasedly converting them into proper statute form. However non-discordant the debate in Parliament was, the Colonial Office was hardly disinterested in the bill and did not casually write the BNA Act verbatim from the Quebec and London Resolutions, but furiously passed the Bill through various drafts until the final hours before the Bill was to receive First Reading. The Colonial Office, too, had its own preferences whose mark is left on the BNA Act, and this mark somewhat obscures the diverse desires of the "Fathers." Mainstream Canadian history, political science, and legal scholarship has been too exclusively dependent on the words and motivation of the Fathers in their analyzes of the BNA Act. One is justified in analyzing the Quebec resolutions on such grounds, but not the BNA Act itself. The BNA Act was a statute of the British Parliament reflected upon and written by the Colonial Office. Although Confederation was viewed by the Colonial Office as a degree of disengagement for Britain from the British North American colonies, it was far from a grant of outright independence; if anything, the contrary was true. Although the BNA Act was based upon the Quebec Resolutions and the Canadian "Fathers of

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[30] Cited by Vaughan, *Canadian Federalist Experiment*, from R.M. Dawson, *The Government of Canada* (Toronto: University of Toronto Press, 1954).

Confederation" viewed it as a faithful translation of their desires; it was a synthesis of the various "Fathers" desires as expressed in the Quebec and London Resolutions written with the prejudices of the Act's Colonial Office draftsmen. The Colonial Secretary's, Lord Carnarvon, comment that the Act "proceeds to provide for the appointment of a Governor General – a officer charged with the duty of protecting Imperial interests, named by and responsible to the Crown"[31] – reflects that the Colonial Office intended to protect Imperial interests and that as the final arbiters of this project, their interests would be protected and their understanding of the union would prevail in its *writing*.

The Canadian federal experiment was the first and continuingly successful federal experiment in a long but splotchy history of British Imperial governance. It is quite ironic that present-day orthodoxy holds that "federalism" is alien to British political culture,[32] for the British have been the most prolific federalisers in world history. Federalism was the prime choice of governance for British decolonisation which produced both spectacular successes and spectacular failures in federal government. As well, Britain has tinkered domestically with variations of federalism over discussions and implementations of Irish autonomy and devolution since the 1880s. Canadian Confederation fits early in this history and remains as its oldest continuing form, but British colonial federalism has even older examples. British attempts at colonial federalism can be traced back to the Albany Plan of 1754 to tie together the American Colonies as well as discussions about federation after the

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[31] Lord Carvanon, *Debates*, 559

[32] See John Kendle, *Federal Britain: a History*, (London: Routledge, 1997), ix-xiii.

Union of Crowns in 1603 and in the debates preceding the Anglo-Scottish Union of 1707.[33] However, literature on colonial federalism focuses on the reasons for union and largely neglects the question of the nature of these unions.[34] Thus, the argument that federalism is alien to British political culture is only true with respect to domestic reflection upon the issue, not due to a lack of practice.

Generally, constitutional histories of Britain and Canada have been examined in isolation from each other. For the British side, as David Armitage has mused, this cleavage results from a belief that imperial events rarely intruded into domestic British politics with the effects of the empire being exclusively reflexive and thus minimally shaped by these experiences. The lack of a singular imperial project – especially towards the North American settler colonies in the 19th century – has rendered most analysis of imperial intervention in constitutional matters to bywords in textbooks. However, the lack of research is often not only due to mere indifference but repugnancy at the idea that imperial and domestic history could be significantly tied:

> *The attributed character of the Second British Empire – as an empire founded on military conquest, racial subjection, economic exploitation and territorial expansion – rendered it incompatible with metropolitan norms of liberty, equality, and the rule of law, and demanded that the Empire be exoticised and further differentiated from domestic history.*[35]

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[33] Kendle, 1-12.

[34] See, for example, Ged Martin, *Britain and the Origins of Canadian Confederation, 1837-67* (Vancouver: UBC Press, 1995).

[35] David Armitage, *The Ideological Origins of the British Empire* (Cambridge: Cambridge University Press, 2000), 3.

For Canadian constitutional history, there is an emphasis on the "colony to nation"[36] approach which tends to portray Canada as gaining a largely independent constitution in 1867 – with only a minor nod to the continuing impact of earlier constitution arrangements and a (subdued, but nonetheless glorious) history of Canada wresting greater and greater powers from the Imperial hold of Westminster. This interpretation misrepresents the connection between Canada and the United Kingdom as well as the United Kingdom and Canada from the wider empire. Canada was no more autonomous in 1867 than it was in 1866. Britain – especially the Judicial Committee of the Privy Council (the JCPC) and the Colonial Office – still retained and exercised considerable powers over Canada. However, these were powers that the metropolis was only slightly less willing to dispense with than the new Dominion was willing to exercise. Developments in the UK Parliament were seen at the time as intimately important precedents for the Canada Parliament.

In interpreting the Constitution, Canadians have seemingly systematically ignored and isolated their history from its wider British Imperial origins, to the detriment in comprehending Canada's own constitutional development and choices. As Robert Vipond comments in *Liberty and Community*:

> *If the constitutional tradition is taken as a point of reference, then this way of stating the choice misreads the past, distorts the choices available to us in the present and constricts our view of the future.*[37]

The renaming of the BNA Act is exemplary of our increasingly insular approach to Canada's constitutional origins and development. The desire to blindly remove the

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[36] This phrase was coined by A.R.M. Lower in his work *Colony to Nation: A History of Canada* (Toronto: Longmans, 1946).

[37] Vipond, *Liberty and Community*, 3.

"colonial" aspects of Canada's history and constitution acts to narrow and restrict where and how Canadians search for constitutional foundations. The renaming of the BNA Act to the *Constitution Act* makes the 1867 Act appear ultimately foundational despite the existence of a massive constitutional structure that was present before its passage and still massively informs Canada's current constitutional structure. Further, it reveals either an ignorance of Canada's role in the wider empire or a purposeful desire to exclude the wider empire. For before the BNA Act, 1867 was re-styled the *Constitution Act, 1867*, there already existed a *Constitution Act, 1867* – a foundational document for the colony/state of Queensland whose title we have found we can justly usurp.

Similar to Armitage's argument, in the post-war period imperialism and colonialism have become dirty words of exploitation and subjugation. This is a shift in language. Such connotations were not shared by British North Americans, nor by those in London in the 1860s. In this period "colonial" and "imperial" were titles worn in the settler colonies with pride and were "dirty" words in London, not as words of subjugation, but burden. "Colonial" had a connotation more akin to those of the ancient Greeks or even the present-day prospect of space colonies – a connotation of innovation and adventure, not subjugation and parochialism. The imperial expansion of Europe created vast empires of exploitation in the last quarter of the 19th century (with perhaps the exception of India) that gives today the negative connotation to colonial status. Although more evident in the Australian context, the status of "colonial" government brought with it the existence of a significantly representative legislature, something that was lacking in Britain until the Third Reform Act in 1884.

It was the Colonial Office, it is often forgotten, who prompted and pushed for Union of the colonies and who ultimately wrote the BNA Act. Although this Act was largely based upon the Quebec Resolutions negotiated by Canadians, specific alterations were made by the Colonial Office and any unity in spirit of the whole Act would have been based upon the Colonial Office's understanding of the new union. This analysis supposes that British North America was composed of British colonies whose colonial "masters" were neither brutal oppressors nor indifferent onlookers. Instead, they were keenly interested and informed administrators, mandarins, and judges who looked upon Canadians as British subjects similar in status to British subjects in the Home Counties.

IV

Thomas O. Hueglin reached back to Althusius at the turn of the 17th Century for a "new" form of federalism to address concerns and find solutions for the turn of the 21st century.[38] My analysis aims at reaching back to a more recent period in time to analyze the origins of an extant federation – but as I will argue – a federation that was conceptualized (in different ways) as radically different from modern federalism as Althusius' conception of federalism. As mentioned above, the oft-repeated orthodoxy among introductions to Canadian politics and otherwise thoughtful analyses of the Canadian constitution, is that the Canadian constitution's "genius" or key innovation is the admixture of the British Westminster Parliamentary system with the American federal system.[39] However, such a conclusion can only be false. This conclusion is akin to looking at a bat and assuming it is a bird because it has wings. Assuming that contemporary Canadian federalism's genealogy can be traced to American federalism ignores the fundamental basis of what modern federalism (and American federalism since its foundation) is based upon; as well, that some sort of "federal" structure was alien to the so-called "unitary" government of the United Kingdom. This conception leaves a logical inconsistency in approaching Canadian federalism. That is, if the intent behind the BNA Act was indeed so centralizing, why would the British Judicial Committee of the Privy Council so consistently rule to protect "classical federalism?" If the British were so enamoured with unitary government, why would their legal community work to undermine those unitary elements in the BNA Act? The development of the Canadian union into a truly federal system[40] throughout the 20th century has acted to obscure the origins of Canada's constitutional foundation.

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[38] Thomas O. Hueglin, *Early Modern Concepts for a Late Modern World: Althusius on Community and Federalism* (Waterloo, Ont: Wilfrid Laurier University Press, 1999), 1-12.

This analysis commences from some of the some problems and questions that Robert Vipond's work on the provincial autonomy raises. There exists ample literature on *how* Canadians and the British created Confederation and *how* that union was altered through judicial interpretation, but little exploration of *what* federalism meant to the Colonial Office and the Judicial Committee.[41] Recent analyses of the provincial rights movements contribute much to the formation of this analysis. The issue they raise is that those same individuals who negotiated Confederation were portrayed as later attacking that same constitution. As stated above, it is almost universally agreed, by both supporters and detractors of centralization, that the BNA Act was a highly centralizing document at conception (by the words themselves and the intent which lay behind it), but it would later become decentralized by political negotiation and Judicial Committee involvement. However, this almost universal assumption fails to properly explain why individuals (such as Oliver Mowat) who helped to create Confederation (as well as many of the supporters of the Great Coalition) would later attack the centralizing features they supposedly once championed. Thus, either these men 'betrayed' their earlier values for 'parochial' interest or one needs an explanation as to why their supposed change reflects an underlying consistency. If one assumes a significant degree of consistency from the various "Fathers," one is left with a new conclusion. The text of the BNA Act can have a more varied meaning than is given it by those reading it with only modern understandings and the words of John A. Macdonald and other explicit centralists.

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[39] For example, see Vaughan, 100.

[40] A federal system being defined based upon popular sovereignty, where this sovereignty is conjointly exercised through at least two orders of government, neither being subservient to the other. This sovereignty is often characterized by bounded ("water-tight") sovereignty being exercised over certain areas (although concurrent powers often exist), with this delineation of sovereignty being set out in a written document assigning these powers, to be adjudicated by an independent judiciary. For other recent definitions see John Kincaid, "Introduction," *Handbook of Federal Countries, 2002*, ed. Ann L. Griffiths and Karl Nerenberg (Montreal: McGill-Queen's University Press, 2002), 7-8 or Ronald L. Watts, *Comparing Federal Systems*, 2nd ed (Kingston, ON: McGill-Queen's University Press, 1999), 6-14.

The axiom generally embraced about Confederation, that greater centralization avoids the difficulties that plagues decentralized federations is ultimately false. The question presented to many of the colonial delegates to the

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[41] Vipond, *Liberty and Community*, 9-10.

Confederation conferences and to the Colonial Office was how to balance the need and desire for decentralization while encouraging a greater degree of uniformity, yet without potentially risking outright separatist demands. However, the 'solution' of a centralized federation simply continues the pre-existing problems and presents the same problems as a unitary state; for the same grievances for autonomy arise. To argue that a centralized "quasi-federal" union would guard against threats of disunity would be to equally argue that the imposition of a unitary state would prevent threats of disunity – an argument to which many exceptions can be listed. The Colonial Office and most of the "Fathers" of Confederation recognized that a legislative union was impossible because of francophone Lower Canadians' (as well as leaders in other provinces) desire for local autonomy; a highly centralized federation whose centralization was imposed from the centre would have no more legitimacy then a legislative union. As well, it seems ludicrous that Lower Canada would reject one system of government that did not provide for its autonomy, but accept another which did the same. If autonomy is sincerely desired, neither a unitary state nor a centralized federation nor "quasi-federation" can overcome that desire.

V

This paper addresses the fundamental questions of "what is Canada?" and "how do we understand Confederation?" It addresses the diversity of responses to those questions as we address contemporary conflicts over the Canadian Constitution. There is not currently one single vision of what it means, nor was there in 1867. In attempting to understand what federalism was as embodied in the 1867 Act, one cannot simply look to those in North America who argued over its creation, but one must also look to the wider tradition in which it was formed, and also to the specific understanding of those individuals who were responsible for converting the Quebec and London Resolutions into a Statute that would be analyzed and interpreted for decades to come.

Recently, Peter Noonan succinctly expressed the orthodox thesis of the intent behind Confederation:

> *The founders of the modern Canadian state preferred a centralist model for state governance, with a powerful federal government retaining links to the Crown and the Imperial Government in London, while the provincial governments become local governments attending to matters of purely local significance, and subordinated to the federal government.*
>
> *That view underwent a wholesale revision by the courts in a series of cases in the late nineteenth and early twentieth centuries. The result was a constitution which was not quasi-centralist, as the founders undoubtedly intended, but one much more akin to a true federation.*[42]

Although it is sometimes admitted that there *may* have been some intent of Confederation as a compact between nations or provinces, it is usually argued that any semblance of that was exorcised from the text of BNA Act. However, what this analysis fails to acknowledge or even realise is that for London it made greater sense to grant self-government to the more local and pre-existing administrations (the provinces), and not to impose a potentially redundant and competitive federal government upon unwilling provinces if an outright incorporating union could not be achieved. The failure to see this expressed in the BNA Act is a failure of properly understanding the context in which the Colonial Office wrote the Act. Although the Colonial Office initially saw greater "efficiencies" in a more centralized union and therefore was very sympathetic to the views of Macdonald and other centralists for the view of a British North American union, respect for the tradition of self-rule prevented the imposition of a unitary government and thus the Colonial Office's embracing of a distinct form of federalism. This distinct form of federalism arose from the need to combine orthodox British understandings of unlimited government with an essentially contradictory Imperial tradition of local self-government.

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[42] Peter Noonan, *The Crown and Constitutional Law in Canada* (Calgary: Sripnoon Publications, 1998), 50.

The British Colonial Office, unwilling to impose an incorporating or legislative union upon its North American colonies, instead embraced the creation of a "federal union" as a reflection of the Imperial recognition of traditional rights (or the "natural" rights of the "ancient constitution") existing in contemporary British political philosophy. Whereas every other extant federation created before or since Canadian Confederation has been based upon the idea of limited government, the British Colonial Office was presented with a highly decentralized proposal for union and converted it into a statutory constitution that preserved that decentralized federal system but within the British tradition of theoretically unlimited government.

Although the BNA Act was crafted in the twilight of the period where British political theory held that sovereignty remained with the Crown-in-Parliament at the Palace of Westminster, local (non-imperial) self-government was viewed by the

Colonial Office as purely administrative, and not a devolution of *de jure* sovereignty. As the theoretical basis of sovereignty gradually shifted from the Crown-in-Parliament to popular sovereignty (expressed through the popularly elected lower house), this led to the conception of sovereignty shifting from being located within the Palace of Westminster to the people of Canada.

Chapter 2

Sovereignty, Federalism, and the Constitution

> What is sovereignty? *If there are questions political science ought to be able to answer, this is certainly one. Yet modern political science often testifies to its own inability when it tries to come to terms with the concept and reality of sovereignty. ... One could say that the question of sovereignty is to political science what the question of substance is to philosophy; a question tacitly implied in the very practice of questioning.*[43]

Bartelson and those other few authors who contemporarily deal with the concept of sovereignty do so within the context of the field of international relations. However, sovereignty is more intimately involved in the question of federalism. The question in the field of international relations is relatively much simpler; it only has to deal with conflicting, but discrete, sovereignties. Discussions of federalism are often faced with not only conflicting sovereignties, but conflicting and overlapping sovereignties. Though often unspoken, or even unknown by discussants, discussions of federalism are – and must be – rooted in a conception of sovereignty.

In simplest terms sovereignty can be defined as internal supremacy and external independence. However, this definition is limited and cannot be applied to constituent governments of federal states as they are neither internally supreme nor externally independent. Bartelson develops a more nuanced conception of sovereignty into which sovereignty is composed of three elements, (1) the source, (2) the locus, and (3) the scope.[44]

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[43] Jens Bartelson, *A Genealogy of Sovereignty* (Cambridge: Cambridge University Press, 1995), 1.
[44] Bartelson, 21.

The source of sovereignty is that which is invoked to explain and justify the latter two elements and the existence of a state in general. In modern times, sovereignty is almost universally ascribed as an attribute of "the people" (this does not necessarily mean the individual is sovereign, however); the most celebrated example of this would be the preamble of the American Constitution that commences, "We the people of the United States." In all modern democracies and even most non-democracies, this principle is applied and invoked as the basis of the legitimacy of the state. Occasionally, this is or has been altered by ideologically Marxist states which proclaimed that the proletariat, a group which would eventually encompass everyone, were sovereign as embodied in the cry of a "dictatorship of the proletariat." This is exemplary that even these other bases of sovereignty are essentially popular.

In the medieval West, for example, divinely appointed Kings were sovereign, and by divine right entitle to rule a given territory. In this example, and similar non-Western examples, it was not that the monarch himself that was sovereign, but God. Admittedly, one could argue that the monarch was not the "source" of sovereignty but merely the "locus," but as the Monarch remains the only earthly source of sovereignty, it effectively becomes the actual source.

A third form of the source of sovereignty was that of the English/British state after the Glorious Revolution and other Hobbesian-style governments, where "parliament" or some sort of legislative body was wholly supreme. In simplified terms, this system can be seen as a mix of both popular and divine sovereignty. By the late middle ages the idea of the "divine right of kings" in its purest form had in many ways largely passed. Although Louis XIV (and many pre-Glorious Revolution

English kings) claimed such a title, the idea of exclusively divinely appointed monarch had largely passed in the Western world. Even by the late middle ages most theorists were already arguing that the people made in His image were at base sovereign, but had at some point alienated this sovereignty to another body[45] – be it a hereditary Monarch or a legislature. Under this conception, God was ultimately sovereign, but instead of kings being the expression of His earthly sovereignty, the people at one point in history were. However, once that sovereignty was alienated to a ruler or ruling body, it could not be rescinded by the people because it was not truly their sovereignty, but the sovereignty of God. Again, the legislature or monarch to which sovereignty was alienated is not the *true* source of sovereignty, but it is the only legitimate earthly expression of that sovereignty. The people could not possibly rescind the sovereignty, because it could only be granted back to them by the body where it lies. This is how territory and people could be transferred in war, as it is passing from one "sovereign" to another "sovereign."

As stated, the second aspect of sovereignty is its 'locus': being the attribute within the state where the power of sovereignty is exercised. In most modern states, the legislature is the locus of sovereignty and exercises that sovereignty on behalf of the people, who are the source. It is the 'locus' – as opposed to the 'source' – which can be readily divided. Even modern conceptions of sovereignty, like the Blackstonian axiom of indivisible sovereignty in its *source*, allow for its division in its *locus*. In modern unitary states, this differentiation in locus exists in both various branches of government and various delegated local governments. France, being perhaps the closest to the ideal of the modern liberal unitary state, is a good example.[46] In France's system of government "the people" through a "constitution" (usually re-written every couple of decades) express their sovereignty by electing representatives to various branches of government. The legislative locus of sovereignty is expressed through elected representatives to the National Assembly and the executive locus of sovereignty is expressed through an elected President (who is in turn constitutionally required to delegate a portion of his executive power to elected members of the legislature – who are dually responsible to that legislature and to the President). Further the National Assembly has delegated sovereignty to other loci (France's various levels of local government and to the European Union), whose legitimacy in exercising this sovereignty is reinforced by having their own elected representatives. Essentially, the source of sovereignty, through the mechanism of a "constitution," defines the locus (or loci) of its sovereignty. Therefore, for example, in modern states "the people" are sovereign, in that they are the ultimate source of sovereignty, but the sum will of "the people" at any moment is not necessarily the sovereign exercise of power, as the source of sovereignty has agreed that its will can only be expressed through the predefined constitutional mechanisms, such as elections, legally valid referenda, etc.

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[45] Charles Edward Merriam Jr., *History of the Theory of Sovereignty Since Rousseau* (New York: The Columbia University Press, 1900), 12.

In Canada's modern system, although we have a constitutional monarchy, it is nonetheless based upon popular sovereignty: the only legitimate source of power is "the people." If the Queen, or the Senate, or even the representative House of

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[46] Adapted from various sources, see Merriam, 80-84.

Commons, attempted to exercise wholly independent power against Canadian constitutional statutes and conventions which govern its composition and legitimate exercise of powers, another element of the government would likely resist such powers on the basis of defending the "will" of the people. A good example of this would be the passage of the GST in 1990, where a Liberal-dominated Senate made the largely unprecedented move of *repeatedly* blocking a *money* bill from the Conservative-dominated Commons, arguing that – although un-elected – the Senate was representing the will of the vast majority of Canadians. This raised the possibility of a constitutional crisis between the lower house with its popularly elected mandate against an unelected upper house resisting the will of the lower house arguing that it was defending the current will of the people (as expressed in various opinion polls, etc). The problem was obviated when the Prime Minister made the unprecedented decision to call upon the Queen to appoint eight new Senators to the upper house in order that the deadlock between the two Chambers could be ended. Although the Crown has immense "reserve" powers to exercise in unusual circumstances against the advice of her ministers, such actions can only legitimately be exercised if the Crown is acting against the advice of her ministers because her ministers are themselves not responding to the desires of the people. All branches of government may act against the momentary will of the people if their actions coincide with the broader constitutional structure.

The third aspect of sovereignty, "scope" is the most objective and 'tangible' aspect of sovereignty. The first aspect "concerns the philosophical legitimacy of the state, the second concerns its status as an acting subject, while the third concerns the objective conditions of unity."[47] This final aspect of sovereignty is its practical application, the people and the territory over which a state exercises its sovereignty and the ease with which a "sovereignty" can wield its power. A "people" may be sovereign and it may claim to exercise this sovereignty through certain loci, but its effective application of this power is the "scope." All three elements of sovereignty are needed to effectively wield power. The "source" provides a stable base which the polity perpetually accepts as a legitimate justification for the exercise of power. The "locus" of power provides a consistent or stable way in which power can be exercised (usually in a distributed manner). Finally, the "scope" of sovereignty is not merely the practical application of its power, but if it is exercised in a stable way, it reinforces both the source and loci as legitimate and true.

This understanding of sovereignty is important to be able to comprehend how sovereignty was understood by the Colonial Office and how our present understanding can cloud what was understood then. For the Colonial Office in the 1860s, Westminster represented all of these elements of sovereignty: Westminster was the source, and locus, and even largely the 'scope' of sovereignty. Domestically, Westminster – combining King, Lords, and Commons – represented all power, legislative, executive, and judicial in both the temporal and spiritual realm.

Although there were political and conventional bars on the unlimited exercise of this power, both domestically and Imperially, it was comprehended in the Colonial Office that Westminster could largely repudiate most of these, but it simply chose to refrain from doing so. The people, or those claiming to represent the will of God or any other earthly force, was subject to the ultimate authority and sovereignty of Westminster within its realm.

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[47] Bartelson, 21.

II

The modern foundation for the conception that Canada was intended to be a highly centralized federation can be traced to the Australian academic K.C. Wheare and his definition of federalism. His monograph *Federal Government*, originally published in 1945, was the first comprehensive analysis of federalism that gained wide readership since *The Federalist Papers* from the 1780s.[48] *Federal Government* was both a theoretical work – describing federalism in strict definitional terms – and a comparative work – examining the world's various contemporary federations. This work became the basis of post-war federal studies, and it is from this work that Canada is described as "quasi-federal,"[49] a description that has since been applied to the intent behind Canada's 1867 federal system.

In the most basic terms, Wheare defines "federal government" as a system of governance that adheres to the 'distinguishing characteristic' of "co-ordinate and independent" governments. This most often takes the form of a "general" government and "regional" governments, which each act *directly* upon the citizen-subject. His definition, however, is too restrictive and only defines one possible (albeit common) constitutional structure of federalism. To properly understand federalism one must address the moral basis of federalism. Or put in other terms, the "why" of federalism and not the "how" of federalism. Wheare's definition is a "how" definition. "Co-ordinate and independent" status defines how a federation can work, but it does not answer the question as to why a federal system was adopted.

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[48] *The Federalist; a commentary on the Constitution of the United States, being a collection of essays written in support of the Constitution agreed upon September 17, 1787, by the Federal convention*, from the original text of Alexander Hamilton, John Jay, and James Madison; Edward Mead Earle (but everyone would eventually become a member of the proletariat), Bicentennial Edition, (Washington: Robert B. Luce, Inc, 1976).
[49] K.C. Wheare, *Federal Government* 3rd edition (London: Oxford University Press, 1953), 20.

This becomes the fundamental contradiction in approaching the Canadian constitution. Although it is a contradiction readily identified and accepted, it is rarely addressed. Most authors agree that Canada adopted a federal system out of necessity because the peculiar interests of Quebec (and the Maritimes) precluded an "incorporating" or "legislative" union, although most of the "Fathers" would have preferred a legislative union if possible. However, from this basis they then claim that the Canadian federation, to be truly "federal" must adhere the to definition "co-ordinate and independent" governments, with that the elements of the *Constitution Act, 1867* that deviate from this principle are described as anti-federal. Yet the purpose of Canadian federalism is not to have co-ordinate and independent governments, but to address the moral need for a mix of "shared-rule" and "self-rule" (or "solidarity" and "diversity"). "Co-ordinate and independent" governments can fulfill this task, but are not requisites.

To nineteenth century British political thinkers, "co-ordinate and independent governments" were a theoretical impossibility. British political thought was animated by the Blackstonian axiom of indivisible sovereignty. They believed any attempt to divide sovereignty into co-ordinate and *independent* bodies would ultimately result in sovereignty migrating to one of the two divisions, something they believed they had ample proof in the contemporary American Civil War.[50] The founders of the American federation subscribed to the Blackstonian axiom as well, but proposed to rest sovereignty in "the people" who could then delegate their sovereignty to various governments. However, British political theory still held tightly to the conception of parliamentary sovereignty, where parliament was sovereign by virtue of being parliament, not by virtue of representing "the people" (as it is today).

The fundamental basis of the modern definition of federalism (and of American federalism since its foundation) is the idea of popular sovereignty – the legal notion that sovereignty remains fundamentally and perpetually with "the people" – whereas the British understanding of sovereignty in 1867 was much more Hobbesian, with the legal notion of sovereignty lying with Parliament. A reflective absence on the original theoretical underpinnings of Canadian federalism that has led to the erroneous belief that Canadian federalism could have only drawn from American federalism since the conception of federalism was essentially alien to British political theory.[51] Although nearly every Western sovereignty theorist since the middle-ages[52] – including Bodin and Hobbes – agrees that sovereignty *originally* lay with "the people," the fundamental basis of Hobbesian thought, and the political thought that underpinned British political theory in 1867, was that sovereignty had been alienated from the people at a single point in time and from thence forward was exercised by Crown-in-Parliament.[53] This point of alienation was generally understood to be the Constitutional Settlement of 1689 that brought in the "balanced constitution" of Crown, Lords, and Commons.[54]

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[50] For example, see Walter Bagehot, *The English Constitution*, edited by Miles Taylor (Oxford: Oxford University Press, 2001), 156.

[51] This is a woefully under-researched field: I could only find a single monograph addressing the issue of British Federalism before the 1880s: John Kendle's *Federal Britain*, and this work only contains a few scant pages on the pre-1880 period.

[52] Merriam, 11.

It is often noted that it is a curious fact that the Canadian Supreme Court (court of final appeal) is not an explicitly constitutionally entrenched body, but exists as a mere Act of the Canadian Parliament. This is a reflection of the nature of "a Constitution similar in Principle to that of the United Kingdom;" that is to say, the 1689 Constitution. Under this constitutional principle there are three branches of government, but they are not legislative, executive, and judicial; instead they are Crown, Lords, and Commons. The ideal of the 1689 constitution is balance, as it is in the modern conception, but a balance in the Aristotelian schema of government. In the Aristotelian categorization of government there were two major criteria for classifying governments: the source from which governing authority was derived (or number of persons in which this authority was vested) and the purpose towards which the exercise of governmental powers was directed. The first criterion envisioned three sources from which authority could be derived and power exercised: by an individual, by an elite, or by the multitude. Authority derived from any one of these three sources could either be for the good of the *polis* as a whole or for the good of those who exercised power (generally to the detriment of the *polis* as a whole). Rule of the one for good was *kingship* or *monarchy* and to the detriment was *tyranny*; rule of elite being *aristocracy* and *oligarchy*; and rule of the multitude being *polity* and

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[53] Bagehot, 185-187.
[54] *ibid*, 6.

democracy.[55] The 1689 model accepted the Aristotelian schema, but refused to put faith in any one system and instead strived to create a balance of the three systems that would ensure that the rule for the best of the '*polis*' was ensured. Thus Parliament, the supreme sovereignty, was a balance of King (*monarchy*), Lords (*aristocracy*), and Commons (*polity* or democracy). It was believed that if each type of rule was required for the passage of legislation, then if any one or two of the branches attempted to pass legislation that was a detriment to the *polis* as a whole, then it would be detrimental to at least one or two of the other branches who would prevent its passage. Thus, the judiciary is not a "branch" of the government, but a delegation of authority from other branches; judicial review under the 1689 Constitution is a delegation of power by Parliament, but – through exercise – it has become a constitutional prerogative of the judiciary. In fact, Canada's court of final appeal in 1867 (and until 1949) was the Judicial Committee of the Privy Council, which, though in practice was a court, "in theory it entertained appeals under the prerogative [of the Crown] and its decisions were cast in the guise of advisory opinions to the Crown."[56]

Thus, one of the most important pieces of contextual political theory that is relevant in reading the *British North America Act, 1867* is to illustrate that the document presupposes, and is based upon, *parliamentary* sovereignty and not *popular* sovereignty and our usual definitions of the nature of government do not apply. The preambulatory phrase that Canada was to have "a Constitution similar in Principle to that of the United Kingdom" should be interpreted as more than merely a mechanism to transmit those unwritten rules of the British Constitution to the new "Dominion." It should be viewed as the guiding principle which permeates the document. This new "federal Dominion" was very much intended to have the "balanced constitution" of Crown, Lords (Senate), and Commons and the document is woven with statements re-enforcing this intent.

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[55] See Aristotle, *Politics*, Book 3, Part 7.

[56] John T. Saywell, *The Lawmakers: Judicial Power of and Shaping of Canadian Federalism* (Toronto: University of Toronto Press, 2003), 57.

One cannot judge and interpret the foundation of Canadian federalism from the base upon which most attempt to do so. Modern federalism can only be based upon popular sovereignty and Wheare's definition of federalism only applies to states constituted as such. Thus Wheare's definition is perhaps fairly applied to every other extant federation, but not to Canada. For those federations which preceded Canadian federalism – the United States of America and the Swiss Confederation (as reconstituted in 1848) – were born out of revolutions and have constitutions that justified their new governments based not upon God, or upon a specific sovereign body (ie a King or Parliament), but upon a liberal conception of "the people." As well, those federations in the British tradition which postceded Canada, though cloaked in the ambit of Imperial parliamentary sovereignty, found their moral and legitimate base upon popular sovereignty, not only among the colonials (for there were many British North Americans who ascribed to that idea in 1867), but in London as well. This is, illustrated by the preamble of the Australian constitution (promulgated in 1900). While the BNA Act's preamble reads: "Whereas *the Provinces* of Canada, Nova Scotia, and New Brunswick have *expressed their Desire* to be federally united into One Dominion under the Crown of the United Kingdom of

Great Britain and Ireland, *with a Constitution similar in Principle to that of the United Kingdom*;"[57] the preamble of the *Commonwealth of Australia Constitution Act, 1900* [hereafter referred to as the CAC Act] reads: "Whereas *the people* of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have *agreed* to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and *under the Constitution hereby established.*"[58] Thus sovereignty is passed from "the provinces" who make 'requests' for a 'British' constitution, to "the people" who themselves "agree" to make a "Constitution [they] establish." In Britain, the *Parliament Act, 1911* confirmed the end of the old balance of King, Lords, and Commons and effectively placed into statute that the people were sovereign, and their sovereignty was expressed through the House of Commons.

This idea is paralleled by Samuel LaSelva in his *Moral Foundations of Canadian Federalism* that "even political theorists do not give sufficient attention to the moral dimensions of federalism."[59] Yet he contends that the acceptance of the "federal principle" was against the political traditions of the British and the British North Americans, citing K.C. Wheare's quasi-federal definition of Canada.[60] In this he fails to fully comprehend the implications of his own arguments. When he argues that "the Confederation settlement… is not irrelevant, even if many of its institutions have fallen into disuse or have lost their meaning," he fails to see that the moral basis of Confederation he attempts to identify, not only illustrates why federalism was adopted in Canada, but how Canadian federalism should be legally interpreted given that its basis is wholly different than that upon which every other federation is founded. These institutions have fallen into disuse or lost their meaning because we have chosen to apply a certain approach to the text of the Canadian constitution that was not intended to be applied by those who wrote the Act and thus produced changes in the intended meaning of the words.

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[57] *British North America Act, 1867*, 30 & 31 Victoria, c. 3 (UK) [Emphasis Added].
[58] *Commonwealth of Australia Constitution Act, 1900*, 63 & 64 Victoria, c. 12 (UK) [Emphasis Added].
[59] LaSelva, *Moral Foundations*, 27.
[60] *ibid*, 9.

III

Discussions of Canada's Constitution are confused by the nature of its development and existence, usually described as being a mix of a "written" and an "unwritten" constitution. This distinction massively confuses the nature of Canada's constitution. As K.C. Wheare argues in an early work on the Statute of Westminster, it is better to refer to a "constitutional structure" (instead of a "constitution") which "consists of rules of strict law, both written and unwritten, and of rules which are not classed as part of the law strictly so called, and these may be written and unwritten."[61] Further, under certain constitutional structures "a selection from the rules of strict law which establish and regulate political institutions is collected in a written document which is called the Constitution."[62] Thus, the United Kingdom is perhaps the best example of a country which "has a constitutional structure, but… no written constitution," whereas the United States is a prime example of a country with a constitutional structure largely defined in a single codified document. The Canadian constitution is in perhaps an unhappy medium of being extensively composed of both. For Canada does contain one central constitutional document (published by the Canadian Department of Justice as a little green book entitled *A Consolidation of the Constitution Acts, 1867 to 1982*). However, this document hardly embodies the majority of Canada's constitution, as it is but one element of a much larger constitutional structure.

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[61] Wheare, *Westminster*, 7.
[62] *ibid.*

Wheare's description (in *Statute of Westminster*) of the UK as having no "written constitution" is misleading, however, and he does seem to recognize this point himself, but does not set out to properly clarify the issue. In the Canadian context, the "written" constitution is usually declared as being the *Constitution Acts* and the "unwritten" constitution consists of conventions such as responsible government. In truth, much of what defines Britain's constitution is "written," but it is not in a single central document. Britain, actually, has an extensive written constitution, including the Bill of Rights (1689), the Act of Settlement (1701), the Act of Union with Scotland (1706), the Act of Union with Ireland (1800), the Parliament Act (1911), the various Representation of the People Acts (Reform Acts) (1832, 1867, 1884, 1918, 1928, 1969, 1985, 2000), the Ballot Act (1872), and the Judicature Acts (1873, 1875, 1925).[63] No simple majority in Westminster could ever conceive of repealing or significantly altering any of the above Acts. Even with patriation in 1982, the *Constitution Act, 1982* remained merely one act of many on the British Statute books which define Canada's constitution, not to mention numerous Canadian statutes that could not conceivably be repealed or altered without substantial consensus.

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[63] *ibid*, 8.

Thus, there are three elements to Canada's (and most countries') constitutions. These elements are (1) those codified into a central document, the *Consolidated Constitution Act, 1867 to 1982*; (2) those elements which are codified but not contained in the central document, such as the Statute of Westminster or the Supreme Court Act or the Canada Elections Act; and finally (3) those elements which are un-codified, such as the convention of "responsible government" (or Quebec's constitutional veto before 1981). This model of Canada's constitutional structure is a centrally important element to understanding the true nature of Canada's constitution; more so when trying to understand the intent of the original Confederation agreement. That preambulatory phrase in the BNA Act of Canada having "a constitution similar in principle to the United Kingdom" is exemplary of the fact that the original Confederation compact came into being in an era and from a constitutional structure that put little (or no) emphasis on a single document; instead, the constitution arose from certain conventions, including the emphasis of political responsibility over strict constitutional limits.

Although somewhat extreme, one can understand any and all constitutions as being wholly "conventional." Since no written single-document constitution anywhere in the world is wholly comprehensive, all constitutions must rely on convention to inform not only those non-enumerated and undefined circumstances, but also which elements of the "Constitution" are to have greater import, primacy, and emphasis. The common and sorry example of so many countries with beautifully written Constitutions that in practice are so easily ignored or casually rewritten further exemplifies this point. A Constitution is worth no more than the paper it is written on unless all parties *conventionally* agree to adhere to it. The American constitutional structure differs from the British constitutional structure in that the Americans conventionally give primacy to one document, whereas the British spread out that constitutional emphasis among a variety of documents.

The traditional definition of the British constitution has been the one given by Henry Bolingbroke in 1733:

> *By constitution we mean, whenever we speak with propriety and exactness, that assemblage of laws, institutions and customs, derived from certain fixed principles of reason, directed to certain fixed objects of public good, that compose the general system, according to which the community hath agreed to be governed.*[64]

From this one should understand that *not only* is the *Constitution Act* itself not the whole of the Canadian constitution, but the *Constitution Act*, the various constitutional statutes, and constitutional conventions are merely the expression of "certain fixed principles of reason, directed to certain fixed objects of public good" that form the fundamental basis of the constitution. 'Constitutions,' statutes, and even conventions should not (and truly cannot be) interpreted from the mere words that form them, but can only be properly read from "certain fixed principles of reason, directed to certain fixed objects of public good." To read them otherwise is to misinterpret them.

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[64] Henry St John, Viscount Bolingbroke, *A dissertation upon parties* (1733-4), *The works of Lord Bolingbroke*, 4 vols. (Philadelphia: 1841) vol. II, 88, cited in Tully, *Strange Multiplicity*, 59 cited from from Peter H. Russell, *Constitutional Odyssey: can Canadians become a Sovereign People?* 2nd ed. (Toronto: University of Toronto Press, 1993), 9.

The development over the 20th century, especially with and since the 1982 patriation, to put increasing emphasis upon the primacy of the *Constitution Act* is largely a conventional constitutional development. However, it is one that has acted to obscure the intent behind the original BNA Act. We assume today that the centrality and meaning of the words in the BNA Act are the same as if that act was to be rewritten today -- which is not the case. To truly understand the intent of the BNA Act we must read it in light of the principles of reason and the objects of public good that informed those who wrote it.

IV

The BNA Act was quietly passed during the same session as the raucous debates over the Second Reform Act. As well, the various negotiations over the BNA Act between the Quebec conference and the Act's passing through Westminster in February 1867 almost perfectly coincide with the serialized publication of Bagehot's *The English Constitution* in *Fortnightly Review*. These contemporary events were foundational to a new conception of politics, but there were events that were yet to overthrow the older era.

Canada's federal system was born in the twilight of the era in which Westminster was truly sovereign. Parliament (whether in Ottawa, Westminster or even in Quebec, Toronto, or Edmonton), in present times and for the last century, is sovereign because its most influential and practically powerful portion – the lower house – is a reflection of the popular will – of popular sovereignty. Parliaments are sovereign because the people are sovereign and they express this sovereignty through

Parliament. This was not the case for the Imperial Parliament in 1867. In 1867 Westminster was sovereign because it was Parliament, full stop. It was sovereignty in a Bodinian or Hobbesian sense: perhaps at some point in history "the people" gave their sovereignty to this body, but once alienated, this sovereignty could not be rescinded – for better or for worse, it was to remain perpetually the sovereignty over all its domains (lands and people). Parliament was the sovereignty that ruled over its millions of *subjects*, not an assembly that represents millions of *citizens*. One can date definitively when Parliamentary sovereignty was unquestionably over-ruled by popular sovereignty with the passage of the *Parliament Act, 1911*. By this Act, the *de facto* primacy of the Commons, already well on its way in the 1860s as revealed by Bagehot, became *de jure* with any semblance of balance between the three parts of parliament – Crown, Lords, and Commons – being utterly removed both conventionally as well as in codified terms.

However, forty-four years earlier, despite the proclamations of the chattering classes on the Western side of the North Atlantic (most evidently in the Confederation debates were the Dorion brothers), sovereignty remained clearly *Parliamentary* and not *Popular* on the Eastern side of the Atlantic. Although the masses – the popular classes – were given a greater voice in 1867 in Great Britain (to be given an even greater voice in 1884) it was the view of those in the ruling classes that sovereignty remained lodged with Westminster, independent of any popular will.

As an analogy I will use Phillip Lawson's analysis of the "Embargo Crisis" of 1766.[65] In sum, in 1766 there was a poor harvest and King George III imposed a temporary embargo on corn exports under the pretension of the power of the Royal Prerogative. However, this action's constitutionality was questionable if not outright unconstitutional, as such actions were seen as having become the exclusive purview of Parliament. The issue was eventually resolved by Parliament passing a bill that authorized the action of the Crown *ex post facto*. Thus Parliament could claim that the action *had* been illegal, but the Crown could equally argue that the action was justified, averting a direct debate over the scope of the Royal Prerogative to over-ride Parliament in times of perceived emergency. During the process of passing the Bill, the MP for the City of London, William Beckford, claimed that "the Crown might dispense with law by the advice of his Council, for the *salus populi*;" a claim for which he "only just escaped the Tower."[66] One of Beckford's colleagues spent a few hours explaining the nature of the British constitution, after which Beckford returned to retract his statement.[67]

The point of this episode is that it illustrates two key concerns of British political thought that became reflected in the British North America Act. The first is my oft stated contention that the British constitution was understood as holding sovereignty in Parliament as a whole and as an independent body, not as a reflection of either the sole power of the king nor the power or needs of the people, the *salus populi*. The second key issue from the above example that became expressed in the

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[65] Phillip Lawson, "Parliament, the Constitution, and Corn: The Embargo Crisis of 1766," *Parliamentary History* volume 5 (1986), pp. 17-37.
[66] Quoted from Lawson, "Embargo Crisis," 32.
[67] *ibid.*

BNA Act is the fundamental crisis of that example: how do you balance the concept of a sovereign Parliament with the necessity of rapid action on certain emergency issues? Historians have often dwelt upon the fact that the old Province of Canada had reached the end of its political life because of sectional "deadlock," but federalism could be seen as only adding to this problem. How do you deal with crises that clearly fall within the realm of "local" interests, but have repercussions that affect the whole of the federation?

Despite whatever political gains the popular classes made in the United Kingdom by 1867, all senior positions remained staffed by those born and bred in the pre-1867 period. Moreover the Second Reform Act hardly brought any semblance of universal *man*hood suffrage with only one-third of the adult male population (and thus one-sixth of the total adult population) being able to vote[68] and with constituencies still considerably skewed to favour country ridings – those without a proletariat and thus with elections dominated by the land-owning aristocrats. As well, although bright capable men may have staffed the various offices of Whitehall and Downing Street, they were not men who had to compete and progress through a professional bureaucracy, and were still strongly imbued with aristocratic ideals and those of a pre-democratic age. One needs only to look the difference in language between the CAC Act in 1900 and the BNA Act in 1867 to see the emergence of popular sovereignty that was evidently lacking in 1867. The preamble of the Australian constitution in contrast to the BNA Act illustrates that in the intervening years between 1867 and 1900, popular sovereignty had become the *de facto* basis of constitutional thought, as expressed in the writing of this Act of the British Parliament.

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[68] Compiled from Jan Lahmeyer, "The United Kingdom: Historical demographical data of the whole country," *Population Statistics: Growth of the population per country in a historical perspective, including their administrative divisions and principal towns*, [On-line database]. Retrieved 10 February 2004, from the World Wide Web: <http://www.library.uu.nl/wesp/populstat/Europe/unkingdc.htm> and "Timeline," Voting age: reduction to 16 [On-line article], Retrieved 10 February 2004, from the World Wide Web: <http://www.citizenshipfoundation.org.uk/main/page.php?82>.

V

> *Our language can be seen as an ancient city: a maze of little streets and squares, of old and new houses, and of houses with additions from various periods; and thus surrounded by a multitude of new boroughs with straight and regular streets and uniform houses.*[69]

In *Strange Multiplicity* Tully adapts Wittgenstein's metaphor to constitutionalism. Tully rightly argues that the present-day (generally European and European-American) "language of constitutionalism (which I call the 'contemporary' language) is a composite of two dissimilar languages: a dominant, 'modern' language and a subordinate, 'common-law' or simply 'common' language."[70] For many theorists the dominant language often entirely obscures and entirely overrides the subordinate common language.

> *It is the terms and uses of those terms that have come to be accepted as the authoritative vocabulary for the description, reflection, criticism, amendment and overthrow of constitutions, and their characteristic institutions over the last three hundred years of building modern constitutional societies. To adapt Wittgenstein's metaphor, it is the language that has been woven into the activity of acting in accordance with the going against modern constitutions. It consists in the uses of the term 'constitution,' its cognates, and the other terms associated with it, such as popular sovereignty, people, self-*

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[69] Ludwig Wittgenstein, *Philosophical Investigations* 2nd edition, trans. G.E.M. Anscombe (Oxford: Basil Blackwell & Mott, Ltd., 1958), 8e.
[70] Tully, 31.

> *government, citizen, agreement, rule of law, rights, equality, recognition, and nation.*[71]

The discussions of modern constitutionalism generally aim to de-legitimize discussions of the ancient constitution as archaic, unjust, and anti-rational. For Tully, modern (and almost always liberal) constitutions are "empires of uniformity" which aim to impose a uniform "rational" order upon the whole populace.[72] However, Tully claims that these modern uniform constitutions actually contain within them "hidden constitutions" that define significant elements of contemporary societies.

Tully argues "the first sites where hidden constitutions appear" in our present constitutional order are those attempts "to come to terms" with "immigrants, women, and linguistic and national minorities fighting for cultural survival."[73] The "hidden constitutions" appear most evidently at these points because it is here where there exists the greatest degree of discontinuity between an ancient constitutional order and the modern constitutional order. For the dominant group(s) that accepts, consents to, and embraces a constitutional order, such adoption of the constitutional order occurs because the fundamentals of the constitutional order particularly accommodate or privilege them. Stated otherwise, a "hidden constitution" exists upon which the present constitutional order is found, and this "hidden constitution" particularly accommodates the dominant group(s). It is often argued that modern liberal western constitutional orders tend to privilege adult white males. This is untrue. Adult white males are generally not privileged by the fundamentals of uniform modern liberal constitutions proper; instead any privileges they receive are the result of "hidden constitutions" which makes their adoption of the uniform constitution more tolerable. "Hidden constitutions" can either blend easily into the modern uniform constitutional order, or they can often end up resisting it.

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[71] *ibid*, 36.
[72] *ibid*
[73] *ibid*, 100

Although explicitly unmentioned in his discussion, Tully's argument is largely informed by Burkean conservatism. The present day "progressive" questions which Tully attempts to answer find their greatest intellectual affinity with, and can be more easily understood when informed by, Burkean conservatism. Burke is the archetypical conservative; thus it would be a surprise to many that he was an ardent supporter of revolution, despite his *Reflections on the Revolution in France.*[74] Burke supported both the contemporary American Revolution as well as the 1688 Glorious Revolution. He did so because he fully supported revolutions which aimed to restore lost elements of an ancient constitutional order. The "hidden constitutions" which Tully discusses would largely be called the "ancient constitution" by Burke. As Burke argues, the Constitution "ought to be adjusted, not to human reason, but to human nature; of which reason is but a part."[75] Modern Constitutions should be seen as rational constructs which we impose upon politics, although as a society and as individuals we can only relate to this constitutional order through our "nature" – thus a uniform, rational, modern constitution must be mediated by "hidden" or "ancient" constitutions.

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[74] Edmund Burk, *Reflections on the Revolution in France, and on the proceedings in certain societies in London relative to that event: in a letter intended to have been sent to a gentleman in Paris* (London: Printed for W. Watson..., 1790).
[75] Edmund Burke, *The Philosophy of Edmund Burke: a selection from his speeches and writings* eds. Louis I. Bredvold and Ralph G. Ross (Ann Arbor: University of Michigan Press, 1960), 82.

Further, Burke argues "the constitution of a country being once settled upon some compact, tacit or expressed, there is no power existing of force to alter it, without breach of the covenant, or consent of all the parties."[76] This, however, is not merely a moral statement that can be steamrolled by superior physical force. If a new constitution is not universally adhered to, dissenters must either be obliterated or repressed. Regardless of the moral question of such solutions, both tasks are costly – often to the point of unsustainability. Modern uniform constitutions must be "empires" and not mere *de novo* "dominions" because they must impose themselves upon a diversity of old ways. No revolution can be wholly revolutionary because the only way to obliterate all the vestiges of the old system in a single coup would be obliterate all the people involved.[77] Revolutions provide new modes of thinking, new institutions, and new conditions of interaction, but they do so only in continuity with old modes of thinking, old institutions, and old conditions of interaction. In general, change in modes of thinking can only occur if it is significantly congruent and often assimilated into older schemes of understanding. If a new idea is to be rapidly and widely assimilated, it must be able to be describe itself within the pre-existing scheme of understanding. When a new constitutional order is introduced it is built upon the foundation, to varying degrees, of the older order.

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[76] *ibid*, 51.

[77] The utter lack of constitutional continuity between Australia of a little over two centuries ago and today is because the original inhabitants were essentially obliterated. Whereas, despite the massive importation of alien ideas into China and two considerable revolutions based upon these alien ideas, China retains a significant degree of constitutional continuity with one and two centuries ago as well as with one and two millennia ago, because although there have been considerable migrations, the population has never been obliterated and thus the old systems of interaction remain. Although the intense conservatism of (rural) Chinese society cannot be universally applied or even specifically applied to Canada's constitutional tradition, it is nonetheless exemplary of the problem confronted in attempting to analyze Canada's constitutional history.

When Tully argues that a "modern" constitution is defined by "a set of uniform legal and representative political institutions in which all citizens are treated equally,"[78] he is actually only defining a particular (albeit the most common) species of a larger genus. He does this in order to clearly make the point that modern constitutionalism attempts to draw a distinct contrast between itself as a rational, just (*viz* fair), and universally applicable constitution against an irrational and unjust ancient constitution:

> *The defining contrast could scarcely be sharper. A modern constitution is an act whereby a people frees itself (or themselves) from custom and imposes a new form of association on itself by an act of will, reason, and agreement. An ancient constitution, in contrast, is the recognition of how the people are already constituted by their assemblage of fundamental laws, institutions, and customs.*[79]

In this, Tully misses that modernity, rationality, and uniformity do not necessarily comprise popular sovereignty and equality. The result of the Glorious Revolution in 1689 was the imposition of a rational uniform modern constitution, but one which did not embody popular sovereignty and equal citizenship.

Earlier,[80] I defined the uniform basis of Britain's constitution; but description can be historical simplification. The Glorious Revolution was radically different from the French Revolution of a century later. The 1689 constitutional compromise was not like that of the first Republic, basing itself on abstract principles. Although it conformed to, and was justifiable by, the Aristotlean schema, this schema was not the causal origin of either Parliament, or the Lower House, or the privileges of that chamber, and so forth. For example, the Commons representation of the "multitude," the origin of the Commons' privilege of initiating supply bills, or the resting of executive power with the Crown: all of these, although justifiable by other lofty theories of government, found their causal origins in specifics of English Parliamentary and constitutional history. Despite my characterization of the basis of the 1689 settlement as being largely non-popular and considerably alien to the present-day understanding of constitutionalism, it is nonetheless a description of a very "modern" constitution, just not "late modern." The above characterization of the "Crown, Lords, and Commons" basis of the British Constitution is highly modern because of its uniformity. What was created in 1689 was a modern uniform constitution which created a properly and wholly sovereign Parliament. Yet despite the absolute sovereignty of this Parliament over the realm of England, at the moment of its inception it immediately bound itself to certain pre-revolutionary rules (customs) and institutions. The most evident of these rules was the Declaration or Bill of Rights, which was largely a restatement of what was believed to be the pre-existing constitution that had been trammelled upon by earlier kings.[81] Although the Bill of Rights is perhaps the most evident retention of pre-Revolutionary customs, the bill itself is nonetheless an act of modern constitutionalism. The Bill of Rights was not a contract requisite in ushering in the new constitution, but a willing and *ex post facto* Act of the Crown-in-Parliament[82]

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[78] Tully, 41.
[79] Tully, 60.
[80] See *supra* Chapter 2, Section 2, pp. 32-34.

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[81] John Miller, *The Glorious Revolution* (London: Longman Limited, 1983), 37.
[82] *ibid*, 36.

It has been widely argued that the 1688 Revolution and the Declaration of Rights were a social contract based upon popular sovereignty[83] *à la* Locke, where the old king had violated the social contract (and thus had become a tyrant) to be replaced by a new Monarch under a new social contract. However, as Cruickshanks has persuasively argued and illustrated, the doctrine of a Social Contract was excluded from the Bill of Rights[84] and that it was more widely understood that the right of resistance to the Crown in 1688 was to be a unique exercise in history, and was not to be repeated.[85] The modern uniform constitution imposed by the 1689 settlement extensively stressed continuity with the past. It was a modern re-incarnation of the "ancient constitution" (which is why Burke was so supportive of it) in an era in which the only other modern constitution which could be imposed was absolutism *à la* Louis XIV.

The adoption of the Bill of Rights implicitly adopted two key aspects of pre-Revolutionary custom. The first and foremost was the retention of English common-law whose origins lay even before the Norman invasion. The Bill of Rights went as far as to subordinate Royal Prerogative to the Common Law.[86] The second was the right of representation of all (male) property-owners and taxpayers of the realm in the sovereign parliament. Although the right to representation was not accorded as one in which "all citizens are treated equally" (with not only boroughs and counties with massive population discrepancies, but a two-rank society of Lords and Commoners), it was nonetheless adopted as a "natural" and "unalienable" right.

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[83] Lois G. Schwoerer, "The Bill of Rights: Epitome of the Revolution of 1688-89," *Three British Revolutions: 1641, 1688, 1776*, ed. J.G.A. Pocock (Princeton: Princetone University Press, 1980), 250.
[84] Eveline Cruickshanks, *The Glorious Revolution* (New York: St. Martin's Press, 2000), 37.
[85] *ibid.*
[86] James Rees Jones, *The Revolution of 1688 in England* (New York: Norton, 1972), 318.

Where the English Imperial and colonial system differentiates from many other European imperial and colonial systems was that the right to pre-existing 'common-law' and 'representation' existed for English possessions outside of the realm of England. The Glorious Revolution did not simply incorporate the pre-existing customs of the English and then universally apply them to all subjects of the Crown-in-Parliament, but acquired possessions outside of the realm of England were generally accorded this privilege as well. Thus, the modern constitution of "new boroughs with straight and regular streets and uniform houses" of a properly and wholly sovereign parliament was built around "a maze of little streets and squares, of old and new houses, and of houses with additions from various periods" of the 'common law' of whatever society became the possession of the sovereign parliament. To extend the above analogy, the pre-Revolutionary constitution of England was one of many ancient cities to which the Glorious Revolution was a modern constitution with its straight roads that came to encompass a number of other ancient cities; for the purposes of this paper, the primary one was the Custom of Paris (*Coutume de Paris*) in Lower Canada.[87]

Can a constitution be illegal? The only logically consistent answer is 'no.' A "constitution," being the fundamental law of a polity, is the ultimate law against which other laws (mere ordinances in relation to 'the constitution') are judged.

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[87] One can see in this a form of co-ordinate federalism. There exists the 'sovereign' tier of a modern constitution co-ordinate with the 'sovereign' tier of local ancient (and often national) constitutions.

However because the term 'constitution' is usually defined so limitedly – especially in the Canadian context – and be it is such an amorphous object, illegal "constitutions" are possible. The error is often made that *A Consolidation of the Constitution Acts, 1867 to 1982* is Canada's "constitution." It is important to repeat that, although central, the Constitution Acts are only one component of the constitution or constitutional structure of Canada. In the same vein, however, Canada is often described as having four constitutions prior to the BNA Act – the A*ct of Union, 1840*; the *Constitutional Act, 1791*; the *Quebec Act, 1774*; and the *Royal Proclamation, 1763*. These "constitutions," however, are merely 'sub-constitutional' as in they derived their existence from a larger constitutional order whose centrepiece is the wholly and properly sovereign Crown-in-Parliament of Westminster.

In Canada's constitutional structure you essentially have competing as well as subordinate constitutions. There are the competing "ancient" and "modern" superordinate constitutions as well as the subordinate colonial constitutions. However, the colonial constitutions contain elements that can be superior to the superordinate constitution because of its composite (co-ordinate or competing) nature of "modern" and "ancient" constitutions. Thus, although Westminster is superior and sovereign over its overseas possessions, its agreement to respect, and thus be co-ordinate with, the "ancient constitution" results in the "common law" of a conquered colony ("their laws, customs, and forms of judicature"[88]) to be co-ordinate with the uniform modern constitution of Crown-in-Parliament. The "common law" of a conquered territory thus becomes the "ancient" component of the composite superordinate constitution. *Thus, a colonial constitution can only be imposed by the Crown-in-Parliament so far as it respects the ancient constitution – the "common law" – of the colony; if it fails to do so, it is a tyrannical act.*

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[88] Lord Mansfield 24 December 1764, from Jane Samson (ed), *The British Empire*, (New York: Oxford University Press, 2001), 85. *Emphasis added.*

If you accept the Constitution Acts (the BNA Acts) and the above pre-Confederation documents as constitutions of Canada, then you are left with the historical precedent of an illegal Constitution; specifically, *the Royal Proclamation, 1763.* That is not to argue that the whole of the Royal Proclamation was illegal or illegitimate, simply those provisions which were repugnant to the larger constitutional structure. Lord Mansfield, the Chief Justice of the King's Bench, argued in 1764 that the Royal Proclamation – in regards to the revocation of Quebec's right to her own legal system – was illegal:

> *Is it possible that we have abolished their laws, and customs, and forms of judicature all at once? – a thing never to be attempted or wished. The history of the world don't [*sic*] furnish an instance of so rash and unjust an act by any conqueror whatsoever: much less by* ***the Crown of England, which has always left to the conquered their own laws and usages, with a change only so far as the sovereignty was concerned.*** *... Is it possible that a man* sans aveu, *without knowing a syllable of their language or laws, has been sent over with an English title of magistracy unknown to them, the powers of which office must consequently be inexplicable, and unexecutable by their usages? ... The fundamental maxims are,* ***that a country conquered keeps her own laws,*** *'till the conqueror expressly gives new.*[89]

Such an argument was based upon the precedent of *Calvin's Case* in 1608:

> *...for if a king come to a Christian kingdom by conquest, seeing that he hath 'vitae et necis potestatem,' he may at his pleasure alter and*

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[89] Baron Mansfield (C.J.) to George Grenville, 1764 in Frederick Madden and David Fieldhouse eds, *Imperial Reconstruction, 1763-1840: The Evolution of Alternative Systems of Colonial Government* (Westport, Conn.: Greenwood Press, 1987), 16-17. (*Emphasis added*)

> *change the laws of that kingdom, but until he doth make an alteration of those law, the ancient laws of that kingdom remain.*[90]

It is possible to read from Lord Mansfield's letter and from *Calvin's Case* that such wholesale repudiations of the pre-existing constitution, although unwise, are hardly illegal since conquest clearly grants the conqueror the right to at "pleasure alter and change the laws of that [conquered territory]." However, a few years after the Conquest of New France with *Campbell v. Hall* in 1774 (arising over a dispute in Grenada), it was ruled by Lord Mansfield that

> ***2. The conquered inhabitants once received into the conqueror's protection become subjects, and are universally to be considered in that light, not as enemies or aliens.***
>
> ***3. Articles of Capitulation, upon which the country is surrendered, and treaties of peace by which it is ceded, are sacred and inviolate, according to their true intent and meaning.***[91]

The first (no. 2) of the above points outlines a general rule in which repudiation of the "common law" of the conquered territory should not radically be changed without the consent of the inhabitants, just as the sovereign power would not radically alter domestic laws without the consent of the inhabitants. Thus, just as Britain's wholly and properly sovereign parliament is subject to the common law of England (and later Scotland) because of its willing adherence to those rules, so too is it bound to respect the constitution of a conquered territory. The second (no. 3) adds a reinforcement to the first. For both under the *Terms of Capitulation* of New France in 1761 as well as the terms of the French cession of that territory to the British under the *Treaty of Paris, 1763* both forcefully stated the rights of the inhabitants to their customary law, the *coutume de Paris. Thus it is established that the "common-law" or "ancient constitution" of an acquired territory is co-ordinate with the "modern" uniform constitution of the Crown-in-Parliament, significantly alterable only with the consent of the affected subjects.*

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[90] Quoted from Samson, 43-44

[91] Quoted from *ibid*, 87

Since the fall of New France, attempts at outright abolition from the pre-existing custom have occurred only twice, and in both those cases they were never implemented: the *Royal Proclamation* of 1763 and the *Act of Union* of 1840. Further both cases can be seen as exceptional, given that they followed armed conflict and a break in constitutional rule.[92] Canada's constitutional structure is characterized by the continuity of pre-existing laws and their amendment with the consent of those people affected (admittedly, the degree of consent and the definition of "affected persons" is somewhat loose). Canada's constitutional order can thus be seen as one of an incredible degree of continuity. Further this continuity – precedents, various "ancient constitutions," and various "common-laws" – has generally held nearly equal force with the modern constitution of 1689, a modern constitution that itself held strongly to the past.

The above exploration serves the purpose of illustrating how difficult it is to understand the intent behind the Canadian federation. The twentieth century imposed a new modern constitutional order upon Canada of "new boroughs with straight and regular streets and uniform houses." However, these "new boroughs" do not surround "a maze of little streets and squares, of old and new houses," but surround "boroughs with straight and regular streets" as well that only in turn surrounds a "a maze of… old and new houses." The constitutional order of Crown, Lords, and Commons I described above was a modern constitution itself built upon a rational order. Although its rational order is different and largely alien from today's, it was nonetheless uniform and rational, and therefore modern. The Glorious Revolution acted to reconstitute the English state upon a new foundation, the above described Hobbesian Parliament of Crown, Lords, and Commons. However, no sustainable revolution is wholly revolutionary; it is not possible to entirely recast a society in a moment; old manners and customs persist even though a new façade may be present. All this makes the task of analyzing the intent behind Canada's 1867 federal settlement all the more complex. For analyzing the settlement is not merely a task of teasing out "a maze of little streets and squares" that form a core of a modern uniform constitution. It is instead a matter of understanding this maze of ancient constitutional practices within the context of a uniform, but alien, constitution. One must not merely ask the question of what some constitutional structure or fragment meant to someone in 1867 and how we understand that in present-day terms, but instead one must ask how some constitutional fragment was understood to someone within their own constitutional structure and then how that understanding relates to the present-day constitution.

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[92] Admittedly, there was a Union bill in 1822 that could have had similar effects, but it died on the order paper.

The constitution created by the Glorious Revolution continues today as the general framework or machinery[93] of Canada's present day constitution. However, more than that mere skeleton of parliamentary practices embodied the understanding of the 1867 federal settlement; Canada's federal settlement came about at a time when those writing Canada's 1867 colonial constitution were informed by Lord Bolingbrooke's 1733 description of the British Constitution, and not by the present-day liberal conception of a single document embodying constitutional practice. When attempting to understand Canada's 1867 federal settlement we must pay particular attention to the more subtle meanings the words employed had in their 1867 context, than what those same words seem to scream at us today.

The American liberal modern constitution has come to dominate our understanding of constitutionalism today and throughout time. It aims towards exhaustion: the constitution lays out all the powers that one can and should exercise. The American constitution is predicated on "checks and balances," where the system only works if all elements attempt to fully exercise their granted powers – the executive becomes too powerful if the legislature defers to it too easily and vice-versa. This understanding, applied in the Canadian context, is fundamentally destructive to understanding the BNA Act's original intent. Restraint and respect is key to Canada's constitutional system, where excess grants of power are the norm, but to be used cautiously and respectfully.

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[93] A term borrowed from Christopher Moore, *1867: How the Fathers Made a Deal* (Toronto: McClelland & Stewart, 1997), x.

VI

Iroquois Wampum Belts have taken on recent significance in Canadian constitutional struggles. The role of Aboriginals in the foundation of Canadian federalism is not examined in this paper, but understanding the Wampum Belt is exemplary of the problem confronted in attempting to understand the Canadian federal settlement in 1867. As with George Bernard Shaw's adage that the English and the Americans are divided by a common language,[94] Canadians, too, are similarly divided – but from their history. Since the words of the BNA Act are amply comprehensible to modern ears we feel no need to translate them. However, the meaning attached to these words has radically changed, which accounts for our failure to translate the BNA Act into present language, taking for granted that because we can read the words directly, so too can we understand them. Moore said of the Fathers of Confederation that they "worked with a constitutional machinery rather similar to what exists today… [but] they operated the machine differently."[95] So too the words of the Constitution Act are nearly identical to those of the BNA Act, but the way the language was used in 1867 by those who wrote the BNA Act is radically different from how it is used today. The example of the Wampum belt can be used as an analogy in approaching the BNA Act.

Wampum belts can be seen as treaties presented by the Iroquois. As Hueglin notes, the Iroquois only started using Wampums regularly when they noticed how "forgetful" the British were in remembering their treaty obligations.[96] Wampum belts specifically – and gift-giving generally – as part of treaty negotiations in Aboriginal culture reflects the aliterate nature of these societies. As language is symbolic representation, written treaties are very specific symbolic representations. However for aliterate societies, specific written treaties are obviously not possible and other forms of symbolic representation must be made. For the Iroquois in their relations with the British, the Wampum belt was that formation.

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[94] A similar analogy was used by Christopher Moore, *1867:How the Fathers made a Deal* (Toronto: 1997), x.
[95] *ibid.*

Perhaps anecdotal, but I know I can remember receiving a certain Christmas gift, who gave it to me, why they gave it to me, and at what point in my life I was given the gift. However, I can rarely remember the specific year unless I relate it to a number of other events in my life. This is perhaps why gift-giving is such an important part of treaty making for aliterate societies, for without reference to specific written dates, events and their meanings can be effectively remembered if tied to the giving of a gift. However, Wampum belts, especially those given to the British were not simply a belt of pretty beads, but were of course made with designs that had significant metaphorical and symbolic meaning.

It is often noted as well – sometimes as a sign of superiority – that Aboriginal societies made use of consensual decision-making. This however should not be interpreted as superiority, but recognized for its necessity and not necessarily as a conscious choice. Without the ability to write down laws and the lack of a state apparatus to coerce dissenters, Aboriginal societies had little choice but to rely on consensus. In order for 'laws' to be universally accepted they must be universally understood, followed, and enforced upon those who dissent. Without writing, one cannot set laws down in one form that all others may uniformly consult and without state apparatus to coerce recalcitrant members, the decisions of one or a few could not be imposed without a much greater degree of consent than in modern and literate societies. Metaphoric wampum belts were used to express the consent of both sides and were envisioned to remind the parties of the intent behind the original pact if one side became forgetful. Wampum belts were designed to be comprehensible to both parties, being visual metaphors they overcame the language barrier and avoided the question of authoritative versions of treaties.

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[96] Thomas O Hueglin, "Constitutional Federalism vs. Treaty Federalism in Canada: Aboriginal Political Thought 'beyond the state,'" paper presented to the conference "The New Federalism in North America," Mexico City, CISAN-UNAM, November 1998, 3-4.

Thus, the value of Wampum belts should be applied to constitutionalism, especially understanding original intent. The metaphor of a document and the document's overall meaning should always be kept in mind when reading any specific line of text. For if the language used to read the document changes, then the document can be rendered meaningless with the words no longer representing the original pact. Despite the greater clarity of the written word, the stability of meaning can be greater with symbolic exchanges of gifts and Wampum belts since meaning is not altered by changes in language. This idea, applied to Canadian constitutionalism, reflects that despite the literal meaning in today's language of any portion of the Constitution Act, the meaning of the BNA Act in 1867 could be radically different. When exploring Canada's 1867 constitutional settlement one must discover the meaning of the phrase or word at the time to the Colonial Office, not what it seemingly indicates in today's alien modes of comprehension.

Chapter 3

Confederation in the Imperial Context

> *The elective is now the most important function of the House of Commons. It is most desirable to insist, and be tedious, on this, because our tradition ignores it.*[97]

To understand the meaning of Canadian federalism as it is embodied in the BNA Act, one must understand the conception of federalism among those who interpreted and wrote the bill. Although it is undeniable that the negotiation of Confederation was largely the product of colonial politicians, the final arbiter remained the imperial government, particularly the Colonial Office. Much of what I have argued earlier in this paper has been done to illustrate that Canadian federalism is built upon foundations of political theory alien to the modern world and every other extant federal state. Canada is the only extant federation built upon a foundation that is not rooted in popular sovereignty as its defining characteristic. As I have alluded, twentieth-century scholarship has tended to either miss this point, or misunderstand its importance.

Popular sovereignty *did* animate the thinking of many colonial politicians and this is evident in the various colonial debates on the subject and led to contemporary conflicts and paradoxes over of the purpose of Confederation. The Confederation settlement came about in the twilight of the era of proper parliamentary sovereignty. The coincidence of the BNA Act with the Second Reform Act and the coincidence of Canada's various debates on Confederation with the serialization of Bagehot's *The*

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[97] Bagehot, 100.

English Constitution (and its coincidental re-publication in codex format in 1867) are indicative of the tumultuous nature of this period.

The mid-Victorian period ushered in the modern world. Late Victorian Britain was a vastly different society than at Victoria's coronation.[98] The late Victorian world was vastly more similar to life a century later than a century earlier if measured by the yardstick of how the world understood politics and government. Most of the changes that occurred in this era were rooted in the same Enlightenment thought that had influenced the French and American Revolutions. However these philosophical understandings took over a century to sufficiently infiltrate the stable and "magnificent" British political system. With the British, the revolutionary ideas of the late 18th century only slowly penetrated British political thought and have remained shrouded in the cloak of traditional terminology.[99] The fundamental theoretical underpinnings of the 1689 Constitution are long dead, yet the machinery of that constitution still persists. However, the most radical changes occurred with the mid-Victorian reforms. Although the radicalist movement in Britain was largely defeated in the 1840s,[100] their demands were not indefinitely resisted. The British ruling classes incorporated their demands so as to avoid outright revolution and maintain much of their traditional power.[101] Thus, the 1860s saw the beginning of movements to popular representation and reform aimed at modernizing the administration of state.[102] The *Second Reform Act* was to lay the foundation of mass party politics and break the exclusive control of British politics by what Bagehot called "the ten thousand." Military and civil service reforms were implemented so that many such positions became professional and competitive instead of mere patronage appointments; it was in 1853 that an open and competitive exam system for the civil service was proposed in a government report. However, although movements pressing for this reform were present during the time of the 1867 Confederation settlement, their effects were not felt until somewhat later. Although the recommendation was put forth in 1853, it was not until 1870 that the British civil service was divided into "grades" with promotion based on merit.[103] Further, the Second Reform Act only enfranchised one out of every three adult males (and one out of six in Ireland)[104] and it is widely held that it was not until Gladstone's Midlothian campaign of 1879-1880 that an election campaign was geared towards the masses.[105] Finally, that body which was to be so important to the development of Canadian federalism, the Judicial Committee of the Privy Council, only took on the form of a modern court after reforms in 1871.[106]

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[98] Queen Victoria reigned from 1837 to 1901. "Mid-Victorian" would *roughly* correspond to the late 1850s to the 1870s and "late-Victorian" to the 1870s to 1901.

[99] The Scots, always the modernizers in Britain, have abandoned the cloak of tradition in their new Parliament, which reveals the true makeup of the Parliament of Westminster, if it were stripped of this cloak of tradition.

[100] Eric J. Evans, *Parliamentary Reform in Britain, c. 1770-1918* (Essex, UK: Pearson Education, 2000), 77.

[101] Philip Harling, *The Modern British State: An Historical Introduction* (Cambridge: Polity, 2001), 99-111.

To borrow a phrase from twentieth-century Canadian politics, the British political world was undergoing a "Quiet Revolution" in the mid- and late-Victorian era. The full effects of this revolution altered the fundamental principles upon which the British and Canadian states were rooted, but these changes were for the near future, not for the 1860s. The Colonial Office and its political masters were staffed by men who were still largely schooled in the thought and writings of Burke over those of Bentham and Bagehot.

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[102] *ibid*, 75-77.
[103] Walter L. Arnstein, *Britain Yesterday and Today: 1830 to the Present*, (Lexington MA: D.C. Heath and Company, 1996), 82.
[104] Chris Cook and John Stevenson, *The Longman Handbook of Modern British History, 1714-1980* (Essex, UK: Longman, 1983), 66.
[105] R. K. Webb, *Modern England: From the Eighteenth Century to the Present* (New York: Dodd, Mead, 1968), 348.
[106] P. A. Howell, *The Judicial Committee of the Privy Council, 1833-1876: Its Origins, Structure, and Development* (Cambridge: Cambridge University Press, 1979).

Thus the Confederation settlement was gestated and birthed amid a 'Quiet Revolution' as to its theoretical basis.[107] Further, it is sometimes ignored that the Confederation settlement was a very loose compromise. The "Fathers of Confederation" did not hold uniform ideas of what the new union was to embody. These men who negotiated and debated the Quebec Resolutions represented widely divergent visions of what the new union was to represent. The Fathers and their various debates reflect the divergent views of not merely a handful of provinces, but of a range of pro- and anti-confederation forces. As stated, everything from a strong, central, over-riding authority to an highly decentralized system were envisioned by the various Fathers. Arguments that the centralized vision of federalism, epitomized by John A. Macdonald's view, was universal, and thus the accusation that men like Oliver Mowat had "developed a new theory of Canadian federalism" and betrayed their centralizing proclamations from 1864,[108] seem harsh. The French-Canadians such as Cartier and Langevin undoubtedly envisioned a much more decentralized union with significant local control, and men such as Mowat wished a union – whether centralized or decentralized – to empower (or 'liberate') their constituents from the pragmatic problems that faced them.[109] Added to this mix were those dissenters, groups opposed to the Confederation project such as the Lower Canadian *Rouge* party under Antoine-Aimé Dorion, or the Nova Scotian anti-Confederates led by Joseph Howe. Among the colonials, Canadian Confederation was an ill-defined project in an era of contested meanings.

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[107] I would, however, comment that popular sovereignty had become much more widespread in the settler colonies (Canada less so than Australia). The British, too, had earlier began to compromise with popular sovereignty with the granting of responsible government in British North America in the 1840s.
[108] Creighton, *Canada's First Century: 1867-1967*, 47.

The Colonial Office understanding thus becomes the 'purest' understanding of the original intent behind Canadian federalism. Although the Colonial Office had a particular vision of what it wanted the union to embody, it largely deferred to what was presented to it by the Colonials. Reflecting on Colonial Office views is critical because the Colonial Office becomes the unified body to which the desires of the colonials would be explained, digested, and finally promulgated. As stated, the BNA Act is neither the Quebec nor London Resolutions verbatim, but a statute that was reflected upon and written by the Colonial Office based upon the Quebec and London Resolutions. Above all, the Colonial Office was required to create a constitution acceptable to all parties. Of course, one cannot approach the Colonial Office as a disinterested observer simply taking the Quebec and London Resolutions and the concerns of the delegates and unbiasedly converting them into proper statute form. The Colonial Office, too, had its own preferences whose mark is left on the BNA Act, and this mark somewhat obscures the diverse desires of the "Fathers." A common error of Canadian history, political science, and legal scholarship has been to analyze the BNA Act on exclusively the words and motivation of the Fathers and to largely ignore what the Colonial Office understood. Since the BNA Act was a statute of the

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[109] See Romney, *Getting it Wrong,* 109-111

British Parliament reflected upon and written by the Colonial Office, its understanding of the 1867 constitutional settlement is of central importance to comprehend because its understanding will explain why the BNA Act was specifically constructed the way that it was.

II

> *Unlike every other federation that has existed it derives its political existence fromm an external authority, from that which is the recognised source of power and right – the British Crown.*[110]

The BNA Act commences with its preamble that the various British Provinces "have expressed their Desire to be federally united." One of the first questions that must be raised when reading the BNA Act is what the term "federal union" meant to the manufacturers of this act in broad terms. In the following section I outline a brief sketch of the meaning of "federalism" to which the specifics of Canadian Confederation will be added as this paper progresses.

I commence this question by stating what "federal union" was *not*. As stated above, most present-day definitions of federalism stem from K.C. Wheare's foundational work, *Federal Governments*.[111] In this work, K.C. Wheare defined "federal government" as a division of powers between local and general governments that were distinct from and co-ordinate with each other, with neither level of government being subordinate to the other, with sovereignty being divided among the various governments. However, the definition he provides nearly eighty years after the Confederation settlement does not directly apply to "federal union" as originally used in the BNA Act. Such a definition, as mentioned earlier in this thesis, was a theoretical impossibility to the Colonial Office. British political theory held to the Blackstonian axiom that sovereignty had to be held in a single, superior, and irresistible locus. "Independent and co-ordinate governments" was anathema to them. Nor was "federal union" what would be called "confederation" in today's definition,[112] nor "federal" in the words of 'Publius' in the *Federalist Papers*.[113] As the colonies were not sovereign bodies which could agree upon and independently ratify an inter-colonial constitution, such ratification could only take the form of an Imperial statute or Order-in-Council.

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[110] Lord Carnarvon, *Debates*, 576a.
[111] Wheare, *Federal Government*, 1-3.

Both the pre-Confederation provinces and the post-Confederation Dominion were "colonial:"[114] they were both wholly subservient to the authority of the Crown-in-Parliament. In a theoretical sense, under Britain's 1689 modern constitution, colonial governments were not – and could not be – co-ordinate, they could only be subservient. The medallion struck by the Bank of England (with the Permission of Queen Victoria) to commemorate Confederation read "*Canada Instaurata 1867, Juventas et Patrius Vigor*;"[115] this is indicative of how Confederation was understood by the Imperial Government. Confederation was not the granting of independence to

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[112] Confederations "occur where several pre-existing polities join together to form a common government for certain limited purposes (for foreign affairs, defence, or economic purposes), but the common government is dependent upon the constituent governments, and therefore having only an indirect electoral and fiscal base." From Watts, *Federal Systems*, 8.

[113] The authors of the *Federalist Papers* differentiated between the "national" elements and the "federal" elements of the new union. In the lexicon of the *Federalist Papers*, 'national' meant what 'federal' means today, and 'federal' meant what 'confederal' means today.

[114] I use the word "colonial" less precisely here than I do later in this paper – for a more precise and legal meaning see Chapter 3 Section IV.

[115] "Canada Reorganized 1867, Youth and Ancestral Vigour" see figure 1

British North American colonies, nor was it even a limited granted of sovereignty,[116] it was merely a colonial reorganization, similarly as the Act of Union had been in 1840 or the Constitution Act of 1791. Nonetheless it was a very significant reorganization.

Despite the fact that I have argued that sovereignty was vested wholly in the Palace of Westminster, there nonetheless rests something similar to popular sovereignty in the Imperial and British constitutions. Colonial Assemblies were *necessities* that had to be created in colonies. It was constitutionally required that in any (Christian) colony of significant population and maturity a *representative* assembly had to created. Although Westminster was the only legitimate source of sovereignty, there existed the sense of the people's inherent rights as "Englishmen" or as "British subjects" which entitled them to a representative assembly. This assembly was not one that automatically emerged from the people and could *only* be created by Westminster, but it was an assembly that Westminster was obligated to grant. The nature and scope of these assemblies' constitution and powers was determined by the Home Government, but creating some sort of *representative* assembly was an *obligation*, not an option. You could characterize the 'multitude' (assuming it is a male-property-owning multitude) as being 'one-third sovereign' as the system of balances under the 1689 constitution made it constitutionally obligatory that they be represented, and the degree of that representation to be 'negotiated' with the Crown-in-Parliament. Thus the myth of Canada as a compact of provinces because the colonies were not sovereign bodies is not purely mythical. Representative assemblies were a constitutional obligation which could not be utterly ignored. Therefore Confederation can be understood as a compact of provinces – more precisely a compact of the representative assemblies (admittedly, with the composition decided by Imperial prerogative) with the Imperial Crown-in-Parliament. Therefore it was a compact of several provinces with the Crown to create a system of governance ("Canada Reorganized") among the several aforementioned Provinces. It was a compact *of* provinces not *among* provinces. The newly created Dominion government was thus a creation of Westminster agreed among its constituent provinces as a mode of regulating their relationship amongst each other and the Westminster, or as the preamble to the BNA Act stated: it was a Union that "would conduce the Welfare of the Provinces and promote the Interests of the British Empire."[117] Thus, Westminster held that it would only introduce a colonial constitution for union "so soon as they shall have been notified that the proposal has received the sanction of the Legislatures representing the several Provinces affected by it."[118]

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[116] As it equally was for John A. Macdonald and most other "Fathers."

The British North American colonies were constitutionally protected entities whose grant of plenary internal autonomy included a grant of full internal constitutional autonomy – just as the British Parliament could alter the constitution of the United Kingdom and the Empire at will, so could colonies alter their constitutions. However, amending the internal workings of colonial constitutions, or even uniting various colonies in North America could no more be done arbitrarily then could the *Act of Union, 1707* be repealed or altered without the consent of the Scottish MPs. Scotland was a "kingdom" within the United Kingdom that had certain rights and privileges which could not be amended without Scotland's consent (even initiation of change without Scottish initiation would be taboo), despite the fact that its sovereignty was subsumed under the Palace of Westminster. The Provinces of British North America held an analogous position, although their stature, and the method of obtaining consent was different, they held certain autonomous powers and rights despite their subordination to Westminster. The Union was created as a "Dominion" not a "united colony" and this reflected a "reorganization" of British rule in North America, as opposed to the establishment of a new society, or even a wholly new constitutional entity. As I will argue through this paper, federalism in 1867 was a reorganization of powers among "colonies" which both pre- and post-existed the act of Confederation.

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[117] BNA Act, Preamble. See Appendix A.

[118] Despatch from Viscount Monck to the Right Hon. Edward Cardwell, M.P (no. 25) from *Correspondence respecting the proposed union of the British North American Provinces: in continuation of Papers presented 7th February 1865, presented in both Houses of Parliament by command of Her Majesty 8th February 1867* (George Edward Eyre and William Spottiswoode, London: 1867), 3.

III

Since the end of the Corn Laws in 1846, the Government of the United Kingdom had become a doctrinaire disciple of free trade.[119] Colonies had suddenly become a burden instead of an asset. In the days of the mercantile empire, the "Old British Empire," the empire was viewed as a closed system. Colonies – mostly the settlement and plantation colonies of North America – provided markets and resources that were indispensable for the sale of British manufactures which could not be sold into the closed trading system of the other European Empires (as well as non-European Empires). However, by the mid-nineteenth century the logics of this system had become dysfunctional. Britain's pre-eminent industrialization meant that Britain was able to successfully compete in continental markets even when faced with a 100% tariff, and the United Kingdom, with 10% of Europe's population, produced 60% of its industrial output (if Ireland was excluded the ratio would be even more astounding).[120] The old world of closed empires had been substantially reduced with the breakdown of the Spanish empire in the Americas, Britain's pre-eminence in India, and the forced opening of trade with China. Britain's colonies of settlement, once the security of the empire, by the mid-nineteenth century provided far too small a market for efficient British manufactures and had become cumbersome burdens to protect in times of war. British North America, especially the Canadas, had become the symbol of what was wrong with Colonial rule to the "Little Englanders" who proposed the shedding of much the British Empire. Canada's three million souls were a pittance of a market and one that would be equally a market whether part of the empire or not, as responsible government had allowed the colony to already charge a hefty tariff on British manufactures.[121] Further, Canada was effectively impossible to defend against a determined American assault and could only be secured, not by securing its borders, but by forcing its post-invasion release through naval bombardment upon America's east coast ports[122] – ports that British traders constantly frequented. For the "Little Englanders," Canada presented significant costs without significant benefits, with the added perception that British North America was a mess to administer; as Disraeli would complain, "our Canadian position which is most illegitimate. An army maintained in a country which does not even permit us to govern it, what an anomaly!"[123] With the advent of responsible government, Little Englanders believed that all the burdens of colonial rule remained with Britain, but they now lost the simple ability to control and rule those colonies (and enforce free-trade); as Disraeli said, "Our colonies are millstones round the neck of Britain; they lean upon us while they are weak, and leave us when they become strong."[124]

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[119] Harling, 84

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[120] *ibid*, 76.
[121] W. D. McIntyre, *Colonies into Commonwealth* 2nd ed (London: Blandford Press, 1968), 37.
[122] C.P. Stacey, *Canada and the British Army, 1846-1871: a Study in the Practice of Responsible Government* revised edition (Toronto: University of Toronto Press, 1963), 170-173.

Thus, one key aspect of British Colonial rule has been the emphasis on "cheap" and "efficient" government; in the pre-Confederation era that meant a plethora of small colonies. As Lord Carnarvon argued "there is at present a tendency towards the disintegration of the vast territories which are called colonies, because those who live at great distances on their extreme borders complain that they cannot obtain from the Central Parliaments the attention which they require."[125] Management of lightly populated and dispersed settlements with poor communications was more efficiently implemented by many smaller colonies, than from a central seat of government. The Canadas were so large only because they had an amazing natural communication system, the St. Lawrence River and the Great Lakes. However, by the 1860s, British North America had been sufficiently settled and communication technologies had so advanced (with steamship, railways, and telegraphs) that such a vast territory could conceivably be administrated with some efficiency from a central location. This explains why an incorporating union was discussed in the 1860s and not simply dismissed as it had been for the last century[126] and especially in the wake of the 1837 rebellions and the *Durham Report.*[127] However, although British North American union was technically feasible by the 1860s, the primacy of the provincial governments repudiated its automatic implementation.

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[123] Benjamin Disraeli to the Earl of Derby (30 September, 1866) from C.C. Eldridge, *Disraeli and the Rise of a New Imperialism* (Cardiff: University of Wales Press, 1996), 86.
[124] Benjamin Disraeli, quoted from Andrew Carnegie, "Distant Possessions: The Parting of the Ways," *The Gospel of Wealth, and other Timely Essays* edited by Edward C. Kirkland (Cambridge: Belknap Press of Harvard University Press, 1962) 125. See also Eldridge, 86.
[125] Lord Carvanon, *Debates*, 563-4.

During the same period there was political opinion in Britain that favoured a political ideology which would later become known as "Greater Britain." The end of the Corn Laws and the rise of "Little Englandism" was matched by the development of "Wakefieldian Colonisation" which advocated the creation of "New Britains" across the globe, typified in the creation of the "planned colony" of South Australia. This element embraced colonial consolidation as a method of securing the aid of Britons overseas in the expansion of English law and commerce to a greater portion of the globe.

Another key element of the Confederation was the massive transfer of debts, assets, and taxation powers to the general government. This is usually cited as evidence of an intent to emasculate the provinces; however in the context of trying to provide "cheap" government, it is not an attempt at fundamentally undermining provincial autonomy. The significant debts of the pre-existing governments were largely accumulated through colossal infrastructure projects (ie railways) that required a massive investment of capital. (Prince Edward Island only joined Confederation after it had bankrupted itself on railway projects.) The British North American union allowed for a greater body (pool of credit and assets) to finance debt and infrastructure projects. The greater the financial ability of the government, the more widely and cheaply capital could be made available. Strictly speaking, Lord Carnarvon's statement that "the assets, property, debts, and liabilities of each [Province] will be transferred to the central body;" was not quite accurate, as section 117 of the BNA Act provided that "the several Provinces shall retain all their respective Public Property not otherwise disposed of in this Act." However, the point of the above statement reflected that the general government was to have significant fiscal powers. However, these powers were not envisioned as a bludgeon to be used against the provinces and their autonomy, but as a method for British North America to get access to cheaper capital by having its loans backed by a single government with a larger tax base and more significant assets.[128]

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[126] See L.F.S. Upton, "The Idea of Confederation: 1754-1858," in W.L. Morton, ed., *The Shield of Achilles: Aspects of Canada in the Victorian Age*, pp. 184-207.
[127] John George Lambton, Earl of Durham, *The Report of the Earl of Durham* (London: Methuen, 1902).

For the Colonial Office, Confederation was an attempt to satisfy both the ideologies of "Little England" and of "Greater Britain." At once it provided cheaper and simpler colonial rule as well as the assignment of more costs and responsibilities to colonials, while at the same time it created the possibility for "one single system of English law and commerce and policy [to] extend from the Atlantic to the Pacific"[129] and the ability to extend the creation of a New Britain from the shores of the Atlantic and Great Lakes across the interior of the North American continent. However, the satisfaction of both these goals was dependent on a satisfied and supportive colonial population; such a condition could only be secured by the grant of widely autonomous powers to the provinces who were recognized as legitimate – almost sovereign – bodies who were unwilling to have their powers forcibly removed.

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[128] See *infra* Chapter 4, Section VI and Chapter 6, Section VI
[129] Lord Carnarvon, *Debates*, 558.

There is little doubt that the Colonial Office, like John A. Macdonald, wanted a more centralized union. One need only examine the first draft of the BNA Bill prepared by the Colonial Office.[130] This bill provided for much more explicit federal control, with the ability of the general government to alter the distribution of powers; the replacement of the title "Lieutenant Governor" with "Superintendent" and the replacement of provincial legislatures making "laws" to passing "ordinances." However, all of the Bill's highly centralizing features were dropped in subsequent drafts. The Colonial Office clearly hoped for centralization, but felt that it should not force it though imperial fiat. It was believed likely that – like free-trade – the provinces, if left alone, would come to see its benefits of uniformity independently.

Lord Monck laid out the key issues for the imperial government in his speech from the Throne that opened the Parliamentary session in which the Quebec resolutions would be debated in the Province of Canada:

> *With the public men of British North America it now rests to decide whether the vast tract of country which they inhabit shall be consolidated into a state combining within its area all the elements of national greatness, providing for the security of its component parts and contributing to the strength and stability of the Empire, or whether the several Provinces of which it is constituted shall remain in their*

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[130] Joseph Pope (ed.), *Confederation: Being A Series of Hitherto Unpublished Documents Bearing on the British North America Act.* (Toronto: Carswell, 1895), 141-157.

> *present fragmentary and isolated condition, comparatively powerless for mutual aid, and incapable of undertaking their proper share of Imperial responsibility.*[131]

The policy of conceding responsible government to colonies possessing representative institutions granted all the rights of local self-government – this included the right to remodel its constitution to suit a colony's varying circumstances. It was with this conception of the Imperial Constitution that the Colonial Office felt it must approach its relations with the North American colonies – the Colonial Office felt that it could only act with the consent and upon the desires of those colonies. However, Britain remained the colonial power and did have interests in North America which transcended the "local" interests of the colonials, the key one being defence. Britain believed union of some sort would provide a better ability to meet the exigencies of imperial defence. Thus, when presented with "the resolutions of the Quebec Conference… as the general basis of such Union," the Colonial Office believed it was charged with implementing these resolutions "in such a manner as may be judged by Her Majesty's Government most compatible with the joint interest of the Crown and of these portions of the British Empire."[132] However, the Colonial Office was impressed that the Quebec Resolutions could be variously interpreted. Despite "a general agreement in the main object and principles of the general scheme" there were "multiplied divergence of opinion in each Legislature, inseparable from discussing a great variety of details in several independent Parliaments" and that it was necessary that the Provinces "avail themselves of the friendly arbitrament of the Queen's government."[133] Thus it was the Colonial Office which was charged with delicately balancing its own interests with the several interests present in the several colonial legislatures, to be completed in a way that would receive the consent (that is, sufficient acquiescence) of the Home Government and the various colonial governments.

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[131] Despatch from Viscount Monck to the Right Hon. Edward Cardwell, M.P (no. 25) January 19, 1865 from *Correspondence respecting the proposed union of the British North American Provinces*, 4.
[132] "Despatch from Lieutenant Governor MacDonnell to Lord Monck" enclosed within "Despatch from Monck to Cardwell" (no. 26) January 20, 1865 from *ibid.*

IV

Lord Carnarvon, during his speech before the House of Lords introducing the British North America Bill for second reading notes that "in conformity with all recent colonial legislation, the Provincial legislatures are empowered to amend their own constitutions."[134] Although merely a sentence in a long speech, the phrase has particularly expansive meaning, for he is making reference to a specific piece of substantive British legislation, *The Colonial Laws Validity Act, 1865* [hereafter referred to as the CLVA].[135] The CLVA put into statute a few long-standing conventions of British Imperial rule that had recently been abused by Justice Benjamin Boothby in South Australia.[136] The CLVA reconfirmed a key principle of British Imperial rule since the Glorious Revolution – the same principle that precipitated the American Revolution – that the Imperial Parliament itself was sovereign for the whole of the Empire (not co-sovereign under the Crown with the colonial legislatures). However, despite the universal and omni-competent sovereignty of the Imperial Parliament, the Imperial Parliament declared that its laws should only prevail in overseas British possession's with legislatures so far as any law *explicitly* declared so. Effectively, it granted universal jurisdiction and plenary powers to all of its colonial legislatures save those areas in which the Imperial Parliament *specifically* decided to legislate. Under the CLVA "all of Her Majesty 's Possessions abroad" (other than India) were given effectively legal equality of status which provided the following definitions:

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[133] *ibid*
[134] Lord Carnarvon, *Debates*, 564-5.
[135] *Colonial Laws Validity Act 1865* 28 and 29 Vic c 63 (UK). See Appendix A.
[136] Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* 3rd ed (Annandale, NSW: Federation Press, 2002), 144-145.

> *The Term "Colony" shall in this Act include all of Her Majesty 's Possessions abroad in which there shall exist a Legislature as hereinafter defined...*
> *The Terms "Legislature" and "Colonial Legislature" shall severally signify the Authority other than the Imperial Parliament or Her Majesty in Council competent to make Laws for any Colony ...*
> *The Term "Colonial Law" shall include Laws made for any Colony either by such Legislature as aforesaid or by Her Majesty in Council...*
> *The Term "Governor" shall mean the Officer lawfully administering he Government of any Colony*

This characterization specifies a number of issues. Despite the immense variety of the names of legislatures and colonial governors, there existed a legally equal status of all the colonies (save the Indian Empire). Although the United Province of Canada was ruled by a Governor-General and the Maritime colonies by Lieutenant Governors, these distinctions were merely administrative and did not indicate a legally inferior or superior status of the colonies. The colony of Canada had legally equal status with New Brunswick as with New South Wales as with South Australia; although the Province of Canada was the senior colony for British North America, and New South Wales for Australia; they were not legally superior to other colonies. An illustrative parallel would be the status of England and Scotland in the United

Kingdom itself: legally equal entities, despite the *de facto* superiority of England due to its greater population, representation, wealth, and so forth.

This status of legal equality of colonies becomes important when applying the CLVA to the BNA Act and provides part of the basis of Canada as a pact of provinces. Section 5 of the CLVA reads:

> *...Every Representative Legislature shall, in respect to the Colony under its Jurisdiction, have, and be deemed to at all Times to have had, full Power to make Laws respecting the Constitution, Powers, and Procedure of such Legislature; provided that such Laws shall have been passed in such Manner and Form as may from Time to Time be required by any Act of Parliament, Letters Patent, Order in Council, or Colonial Law for the Time being in force in the said Colony.*

The Canadian Parliament, however, was explicitly denied the ability to alter its own constitution (which has further implication on the nature of judicial review). Section 92(1) of the BNA Act (Quebec Resolution 42, and London Resolution 41(1)) grants provincial governments the ability to alter their own constitutions, but the BNA Act (in 1867 and until 1949) lacked a parallel provision for the Dominion government. *This denies the Dominion government the status of a "colony," a status granted to the provinces*. However, the Dominion government not being a colony did not grant it superior status to a colony; if anything it may have been given a reduced position. Although the Dominion government was granted significant powers over the provincial governments, the dominion government's status was essentially ethereal with an indeterminate legal status under the CLVA schema. In both the Quebec and London resolutions, the status ("rank") of the Dominion government was not defined and was to be left to the pleasure of Her Majesty.[137] Although the Dominion government was granted certain substantive powers, the moral authority to exercise these powers can be seen as quite limited in the context of responsible government.

Not only were the provinces continuous with pre-confederation colonies, but under the CLVA the provinces remained "colonies" since they continued to have a "governor" and an "assembly," as well as the ability to amend their own constitutions. The Dominion government, however, lacked this status. Although the dominion government had a "governor" and an "assembly," the specific denial of the ability to amend its own constitution therefore had rendered it a status qualitatively different from a "colony," a status, however, which the provinces retained post-Confederation. However, although exercising certain superior powers over the provinces, the Dominion government cannot automatically be granted a superior "rank and status" to the provinces. Under the CLVA, the empire was divided into four classes. The most superior was the Home Islands of Great Britain and Ireland which was headed by the Monarch herself and which was represented directly by the ultimate authority of the Imperial Parliament. The second-class rank within the Empire according to the CLVA was the Indian Empire, by its exclusion from status as a "colony" and by virtue of it being represented by a fully sovereign Viceroy instead of a Governor with a specific delegation of power.[138] The third-class rank with the Empire is that of "colonies," which – as stated above – included any British overseas possessions headed by a "governor" (no matter how he was styled), an "assembly" (no matter how it was styled nor the number of chambers), and the ability to amend its own constitution. The final status was those miscellaneous holdings that (in general) lacked an assembly. Thus the creation of the new Dominion does not fit within the CLVA ranking system: it could not be ranked in either of the first two classes because its chief officer lacked the full sovereign powers the crown, as did the Monarch or the Indian Viceroy held, nor could it be ranked in the third category because it lacked the ability to amend its own constitution. Therefore the Dominion was presented with a perhaps more dignified status than a colony, such as the relationship between a Governor-General and a Lieutenant Governor; but with a legal status inferior to a colony and therefore inferior to the provinces. *Colonies were dynamic bodies which could define their own constitution; the new Dominion was a "permanent enactment"*[139] *that came into existence exclusively upon the demand of the federating provinces through the instrument of Imperial sovereignty.*

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[137] Pope (ed.), *Confederation*, 52 and 110.

[138] *Cameron v. Kyte* [(1835), 12 ER 679] confirmed that a Viceroy had a truly plenary grant of the sovereign's authority, whereas the grant of authority to a Governor was merely that authority *specifically* given under a governor's letters-patent (ie if a Governor commits an act outside of his specifically granted authority and the Home Government fails to explicitly repudiate the act, it is still invalid. Whereas if a Viceroy commits an act, the Home Government must specifically repudiate it if

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it is not to be legally valid.) Canada's Governor General is presently a Viceroy I all but name, as under the current (1947) letters-patent, the Office was granted the full authority of the Crown.

[139] Lord Carnarvon, *Debates*, 562

Chapter 4

The Quebec Resolutions

> *The founders of the modern Canadian state preferred a centralist model for state governance, with a powerful federal government retaining links to the Crown and the Imperial Government in London, while the provincial governments become local governments attending to matters of purely local significance, and subordinated to the federal government.*
>
> *That view underwent a wholesale revision by the courts in a series of cases in the late nineteenth and early twentieth centuries. The result was a constitution which was not quasi-centralist, as the founders undoubtedly intended, but one much more akin to a true federation.*[140]

In late 1864 the Colonial Office received a proposal for British North America of seventy-two resolutions: the *Quebec Resolutions*. By the 1860s, the British authorities had wholly abandoned any idea that they could simply impose a constitution upon the British North American colonies (if it ever had[141]). Instead it required not merely the consent of those colonies, but that change could only occur on the nomination or initiation of the colonies themselves. Encouraging closer (and thus more self-reliant) union had been a consistent theme of British rule in North America (and among settler colonies in general) from at least the Albany Plan of 1754, through the recommendations of the Durham Report, to Sir Edmund Head's recent plans in 1858, and finally to Governor Gordon's encouraging of Maritime union in 1864;[142] the Union of the Canadas in 1840 should be viewed as significant exception. Despite consistent British pressure[143] for greater unity among her colonies, Britain had usually succumbed to colonial pressure for "disintegration of the vast territories which are called colonies, because those who live at great distances on their extreme borders complain that they cannot obtain from the Central Parliaments the attention they require;"[144] thus the dismemberment of New Brunswick and Prince Edward Island from Nova Scotia. The granting of responsible government, and its corollary of auto-constitutional amendment (as expressed in the CLVA), essentially removed direct British power in initiating constitutional development in mature colonies.

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[140] Peter Noonan, 50.

[141] One should note that a constitution has never been imposed upon without the consent of the legitimate legislative body of the colony. In 1774 and 1791, there was no assembly to approve the new constitution and in 1840 the new constitution was technically not imposed, as the consent of the Upper Canadian legislature was received, as was the temporary assembly set up in the wake of the Lower Canadian uprising. As well, in 1822 there was a bill at Westminster that proposed union of the two colonies, but never received the assent of the two colonies and died on the order paper.

Although the British had certain desires, preferences, and even requirements for the colonies, these all had to be determined within the desires, preferences, and especially requirements of said colonies. Although Britain was the sovereign imperial centre, the grant of self-government to colonies placed it in an often reactive role to colonial ambitions; Britain's theoretically unlimited power made its autonomous exercise of even limited powers that much more difficult. Thus in order to understand how the British Colonial Office understood the federal settlement in 1867, one must understand the basis upon which that settlement was developed. Below,[145] I will go through the specifics of the BNA Act, which is largely based upon the London and Quebec Resolutions. In this section, however, I will focus on those portions of the Quebec Resolutions which differed from the final BNA Act, as well as the differences between the London and Quebec Resolutions.

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[142] See L.F.S. Upton, "The Idea of Confederation: 1754-1858."

[143] Ged Martin significantly criticizes the phrase "British pressure" in *Britain and the Origins of Canadian Confederation* as a largely vague and thus empty (See Ged Martin, *Britain and the Origins of Canadian Confederation,* 31). However, but "British pressure" in this context I am referring to continual British discussion and encouragement of colonials in this direction.

[144] Lord Carnarvon, *Debates*, 564

[145] see *infra* Chapter 7, pp. 143-171.

II

One of the most common comments on the Quebec Resolutions – and Canadian constitutional making – is its lack of philosophical inquiry and its focus on pragmatism. It is often claimed that the British American delegates had no interest in searching for "first principles" nor "abstract notions" of enlightenment theory of the perfection of humanity.[146] Yet the choice of language used in the Quebec Resolutions seems to betray forays into political philosophy.

> 1. *The best interests and present and future prosperity of British North America will be promoted by a Federal Union under the Crown of Great Britain, provided such Union can be effected on principles just to the several Provinces.*

The first resolution clearly states that the Quebec delegates were crafting a "Federal Union" that was to benefit (be "*just*" to) [147] "the several Provinces."[148] It has been claimed that this guarantee was not truly intended and that the federal aspects were designed with the effectiveness of vestigial organs – images of federal structures to placate a dissenting minority. It is sometimes further noted that "federalism" could not have been truly intended because such a system of government had been discredited by the disruption to the federal union to the south.

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[146] For example see Vaughan, *Canadian Federalist Experiment,* 3-5 or Creighton, *Road to Confederation.*

[147] "Benefit" was the term used in the preamble to the BNA Act, "just" was the term used in Quebec Resolution 1.

[148] Quebec Resolution 1.

However, if this latter argument were true, it seems very unlikely that those who disdained federalism because of the disruption to the south would even be willing to contemplate the word "federal" as a descriptor of the new constitutional settlement. Lord Monck's reaction to the Quebec scheme is exemplary of this. He believed that what was needed for British North America was a highly centralized, effectively legislative or incorporating union and "that the designation 'Federal…' as descriptive of the intended Union is calculated to direct into a wrong channel the minds" of those attempting to comprehend the new union.[149]

P.B. Waite's comments are typical of this mentality: "The French Canadians and the Prince Edward Islanders insisted that the constitution be federal, and the constitution was certainly called federal; what it was really intended to be was another matter."[150] Such a comment seems to dismiss that the French Canadians and Prince Edward Islanders had any hand in the crafting of the proposed constitutional settlement. Such an argument could perhaps, in a limited way, be made in the case of Prince Edward Island, who – like the rest of the Atlantic delegates – were somewhat overwhelmed by a prepared Canadian proposal and whose delegates to Quebec became alienated from the rest of the delegates as the conference wore on. However the same could in no way be said of the francophone Lower Canadians who were intimately involved in the crafting of the Union, in presenting it at Quebec, and in championing and defending the scheme until it became an imperial statute in 1867.[151]

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[149] Lord Monck to Lord Carnarvon, 7 September 1866. Quoted from W. Menzies Whitelaw, "Lord Monck and the Canadian Constitution," *Canadian Historical Review* 21 (September 1940), 300.
[150] P.B. Waite, *The Life and Times of Confederation, 1864-1867: Politics, Newspapers, and the Union of British North America* 3rd ed. (Toronto: Robin Brass Studio, 2001), 120.

Despite the characterization by Creighton and most other authors of the new union as either the annexation of other British North American colonies into the government of the Province of Canada[152] or as the casting of a wholly new dominion with equally *de novo* local bodies, it was the general understanding of the francophone Lower Canadians and the Martimers that the new union involved the creation of a new government in Ottawa which alienated certain powers from the pre-existing local bodies (and the imperial government).[153] Even among francophone Lower Canadians who did see Confederation as creating a *de novo* government for Lower Canada, its creation was about maximum separation from other Anglo-protestant colonies – especially Upper Canada – and they wanted to ensure that this new legislative body was constitutionally protected from outside interference.[154]

The remarks of certain metropolitan commentators that the proposed union was "not a federation, but a kingdom, and practically to extinguish the independent existence of the several provinces.... [The Fathers of Confederation] hope, no doubt, that the course of events will practically decide the ambiguity in favour of the incorporating union"[155] was opposite to what was proclaimed by francophone Lower Canadian newspapers:

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[151] John T Saywell, "Backstage at London 1865-1867: Constitutionalizing the Distinct Society?" *National History: A Canadian Journal of Enquiry and Opinion*, 1:4:331-346 (Summer 2000).
[152] Waite, *Life and Times*, 119
[153] *ibid*, 117-118
[154] *ibid* and Silver *French Canadian*, 33-50
[155] Goldwin Smith "The Proposed Constitution for British North America," *MacMillan's Magazine*, March 1865, 408, quoted in Waite *Life and Times*, 120.

> *Le fait est que les pouvoirs du gouvernement fédéral, comme ceux des corps locaux émaneront également du parlement impérial, qui seul a le droit de les déléguer. Chacun de ces gouvernements sera investi de pouvoirs absolus pour les questions de son ressort et sera également souverain dans sa sphère d'action...*[156]

Here we see a succinct, but nuanced understanding of federalism which is perfectly "in accordance with twentieth-century abstract theory"[157] of federalism. Does not Wheare's description of "co-ordinate division of powers"[158] translate beautifully as discrete governments being invested with "pouvoirs absolus"[159] for "les questions de son ressort"[160] that would be "également souverain[s] dans leur sphère d'action?"[161] If anything, the French-Canadian media seemed to have a quite advanced comprehension of federalism. Admittedly, despite the clear understanding of federalism *Le Courrier* proclaimed, such an understanding could be argued as having little weight in the Confederation discussions, unlike the *Globe* or certain other Maritime newspapers whose editorial pages were sometimes filled with the words of the delegates (as editors). However, simply because Langevin and Cartier were not newspaper magnates *à la* Brown, does not mean that the francophone Lower Canadian press did not express the views of Cartier or Langevin. It was widely understood that *La Minerve* was the mouthpiece of Cartier and it expressed similar views of federalism to other francophone Lower Canadian papers.[162]

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[156] "The fact is that the capacities of federal government, as those of local bodies, will also emanate from the Imperial Parliament, who is the only one with the right to delegate them. Each one of these governments will be invested with absolute capacities for the questions of its competence and will be also sovereign in its sphere of action." [My translation] *Le Courrier de St. Hyacinthe*, October 28, 1864, quoted in Waite, *Life and Times*, 118.

[157] Creighton, *Road to Confederation*, 178.

[158] Wheare, *Federal Government*, 8

[159] "absolute capacities"

[160] "questions within its competence"

[161] "equally sovereign in its sphere of action"

This first resolution continues that the union was to be formed, only on "principles just to the several provinces." Admittedly without recourse to popular sovereignty, as in the case of the American polity, not referring to the provinces would be more difficult, because they were the only pre-existing polities that could be referred and one can easily be compelled to refer to some sort of antecedent when defining a "new" political settlement. However, if the creation of a new centralized uniform British North American 'nationality,' or polity, was intended by all the delegates, then that final phrase of the first resolution would likely simply not have been added – as it is grammatically unnecessary to the structure of the resolution. The American constitution, for example, in its preambulatory clause states that the new union is to provide for the "common defence [and] promote the general welfare" without any reference to the pre-existing states. These references to the provinces were unnecessary if a *de novo* colony was envisioned, but the Fathers nonetheless repeatedly included them. Their constant and consistent inclusion reflects the understanding that the provinces were continuous pre- and post-Confederation and that the Dominion government was a mere federal regulation among them.

> *2. In the Federation of the British North American Provinces the system of government best adapted under existing circumstances to protect the diversified interests of the several Provinces, and secure efficiency, harmony, and permanency in the working of the Union,--*

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[162] J.-C. Bonenfant, "CARTIER, Sir GEORGE-ÉTIENNE," Dictionary of Canadian Biography Online accessed 2004-02-28 <http://www.biographi.ca/EN/ShowBio.asp?BioId=39006>.

> *would be a General Government charged with matters of common interest to the whole country, and Local Governments for each of the Canadas and for the Provinces of Nova Scotia, New Brunswick, and Prince Edward Island, charged with the control of local matters in their respective sections.*

The above, admittedly, may not seem like a very nuanced exposition of federalism with little difference from a simple "Confederation" (in the modern definition) as it is proclaimed among various sovereign states. However, the recognition of this is keenly important, because, again, the proposed Union can be seen as being framed not as a *de novo* country or colony, but as merely an alliance among "provinces." Despite the limiting phrase that the local governments will only have "control of local matters" the general government is equally limited to "matters of common interest to the whole country" and since this grant is limited by the Federation's purpose of "protect[ing] the diversified interest of the several provinces," the rights of the provinces in determining what is local and what is common is implied, much more so than the reverse.

> *23. The Legislature of each Province shall divide such Province into the proper number of constituencies, and define the boundaries of each of them.*
>
> *24. The Local Legislature of each Province may, from time to time, alter the electoral districts for the purposes of representation in the House of Commons, and distribute the Representatives to which the Province is entitled, in any manner such Legislature may think fit.*

These resolutions (neither of which made their way into the London Resolutions or the final BNA Act) are usually not reflected upon when examining the nature of the proposed union under the Quebec scheme. The existence of such resolutions should be shocking. First, it is an explicit import from the American constitution, not merely because it is the method by which federal constituencies are drawn in the United States, but because it also specifically contravenes British constitutional traditions. It is a key prerogative of the Lower House of Parliament to define its own membership, which these resolutions clearly violate. Further, it eliminates the possibility that the new general government could ever be above or autonomous from not merely the local concerns of their constituents, but from the provincial legislatures. One complaint and strong reason often proclaimed for union was to be able to escape, to a degree, the need of parliamentarians of being mere "delegates" of their constituents instead of being parliamentarians concerned with broader and longer-term general interest. These provisions would exacerbate this and make federal parliamentarians quite dependent on the graces of local parliamentarians.

III

Donald Creighton's seminal work on Canadian Confederation, *Road to Confederation*, generally proclaims that the resolutions adopted at the Quebec Conference were aimed at creating a highly centralized union which the delegates, by-and-large, reached a consensus (admittedly, based largely on a pre-designed Canadian plan). Creighton notes "John A. Macdonald rose to present a long detailed resolution on the powers of the general government," a resolution which "closed with the grant of authority to legislate 'generally, respecting all matters of a general character, not specially and exclusively reserved for the local governments and legislatures.'"[163] This resolution made its way into the *Quebec Resolutions* as section 29(37). Creighton cites this closing phrase along with the preambulatory grant of "peace, welfare, and good government" as "comprehensive endowments of power."[164] Creighton is largely correct in making this determination, and such a conclusion is reinforced by the fact that contemporaneously to the Confederation settlement, Lord Monck emphasized these same points in attempting to illustrate that "the intention of the framers of the Quebec plan was to constitute a strong central authority the power of which should be supreme and pervading throughout the Union with Provincial bodies of a completely subordinate & municipal character for the administration of purely local affairs."[165] No doubt, this is what John A. Macdonald intended, and – further – their inclusion in the Quebec Resolutions could reflect the conference's belief in a centralized union. It is, thus, somewhat curious that this clause did not make its way into the BNA Act, although the provincial equivalent – "generally all matters of a private or local nature, not assigned to the general parliament" – did manage to secure itself in both the *Quebec Resolutions* and the final BNA Act.

What becomes of interest, is that if one examines the key source on the passings of the Quebec conference,[166] there is no explicit recording of this key clause proposed by Macdonald ever being adopted, except for the fact that it appears in the final text of the Quebec Resolutions. Pope's *Confederation Documents* notes that John A. Macdonald introduced his resolution and lists all 32 enumerated heads (including number 32 "…all matters of a general character…"),[167] but notes that this motion was adopted after "further debate" with "certain amendments" and then goes on to list only 28 heads being adopted (with the first 26 essentially being Macdonald's heads, at the last two being a modification of Macdonald's 27th head), thereafter the conference breaks for the day and does not resume the topic the following day.[168] Given that Macdonald's final enumerated head ("…all matters of a general character…") appears in the Quebec Resolutions one would be inclined to believe that this is an error of record-keeping and that this portion of the resolution was duly adopted at this time.

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[163] Donald Creighton, *Road to Confederation*, 165-166
[164] *ibid*, 166
[165] Lord Monck to Lord Carnarvon, 7 September 1866. Quoted from W. Menzies Whitelaw, "Lord Monck and the Canadian Constitution," *Canadian Historical Review* 21 (September 1940), 300.
[166] See G.P Browne (ed), *Documents on the Confederation of British North America (*Toronto: McCelland and Stewart Limited, 1969) and National Archives of Canada. Macdonald Papers MG26 A, vols. 44-49. [Reel No. C-1503 to C-1505.] and Joseph Pope (ed.) , *Confederation: Being A Series of Hitherto Unpublished Documents Bearing on the British North America Act* (Toronto: 1895).

However, when one checks the original records[169] (including the records cited by Donald Creighton), one discovers that this is not the case. The minutes of the Quebec Conference contain a typewritten insert of Macdonald's motion, but with the heads 28[170] to 32 entirely crossed out (see figure 2 and figure 3). Further, these notes then record the discussion of each of the various heads, until head 27, which concludes with "amended," after which the records for the day (and the motion) end. Admittedly, this could simply be the result of bad record keeping with the discussion of the further heads simply lost, although nonetheless approved, because there is no record on this page of the meeting adjourning for the day. However, this seems somewhat unlikely as all the previous pages of notes are recorded upon all the way to the bottom of the page, whereas a couple of inches of space are left upon this final page, which corresponds largely with the notations made upon the typewritten page which commenced this motion (see figure 4 and figure 5).

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[167] Pope, *Confederation,* 22-23
[168] *ibid* 24-25
[169] *Macdonald Papers*, MG 26 A, vols. 46 to 51 (National Archives of Canada reels C-1503 to C-1505).
[170] It is also interesting to note that one head 28 made its way into the final draft of the BNA Act, but not in section 91, but in section 92 – s. 92(10c).

One could justifiably argue, again simply due to bad record keeping, that the full complement of heads of power proposed by John A. Macdonald must have been adopted because they all made their way (in one form or another) into the final edition of the *Quebec Resolutions*. However, this is not necessarily the case. For when one examines the various drafts of the Quebec Resolutions that have been preserved and are publicly available, one discovers certain drafts which correspond almost exactly with the proceedings of the minutes that remain available and others which more precisely correspond with the published *Quebec Resolutions*. The drafts which closely correspond with the preserved records do not include the adoption of those heads of powers crossed out in the minutes. One would assume that if the extant documentation of the Conference only represents a partial record, then the drafts of the Quebec Resolutions, being composed from the full extent of contemporary documentation (and possibly contemporary personal recollection) would contain those resolutions which were adopted at the conference, but which are simply missing from extant records. However, this is not the case; marginal notes in the draft reflect the ambiguities of resolution adoption at the conference. One draft (see figure 6), for example, lists the 28 heads of power contained in the notes but makes a marginal mark (seemingly questioning its inclusion) beside the 28th, for which the records of the proceeding do not record debate and adoption of that head of power.

Although the published Quebec Resolutions were approved by the delegates in Montreal after the Quebec Conference (while they were travelling throughout the Canadas to promote the scheme), what the changes in the drafts of the Quebec Resolutions seem to indicate, when read in light of the records of the conference itself, is that the final draft of the Quebec Resolutions was not the result of the approved consent of the delegates during the conference, but that whoever was charged with preparing the final draft of these resolutions chose to write them not as adopted by the Conference, but however this person deemed most appropriate. Obviously the inclusion of Resolution 29(37) was not anathema to any delegate because none of the delegates chose to officially contest it. However, one could easily surmise that if there was an objection to its inclusion that there would have been intense pressure in Montreal not to complain so as to ruin the unity on the issue before the public.

I dwell on this point not only because of the importance which Creighton placed upon its inclusion in the 1960s and Lord Monck's emphasis upon it in the 1860s, but because this resolution failed to make its way into the BNA Act (but its provincial counterpart succeeded in doing so). It is a highly important clause, one which could have likely strengthened the hand of the General Government; a point recognized by key centralisers in both the 1860s and the 1960s. Yet its failure to be accepted by the Quebec Conference and its eventual failure to make its way into the BNA Act reveal the considerable lack of a consistent centralizing ethos among the

Fathers of Confederation and the Colonial Office which would eventually implement their construct.

IV

> *29. The General Parliament shall have power to make Laws for the peace, welfare and good Government of the Federated Provinces (saving the Sovereignty of England), and especially Laws respecting the following subjects:*
>
> > *(32) The criminal law, excepting the constitution of Courts of criminal jurisdiction, but including the procedure in criminal matters.*
> >
> > *(33) Rendering uniform all or any of the laws relative to property and civil rights in Upper Canada, Nova Scotia, New Brunswick, Newfoundland, and Prince Edward Island, and rendering uniform the procedure of all or any of the Courts in these Provinces; but any Statute for this purpose shall have no force or authority in any Province until sanctioned by the Legislature thereof.*
> >
> > *(34) The establishment of a General Court of Appeal for the Federated Provinces.*
>
> *43. The Local Legislatures shall have power to make Laws respecting the following subjects:*
>
> > *(15) Property and civil rights, excepting those portions thereof assigned to the General Parliament.*
> >
> > *(16) Inflicting punishment by fine, penalties, imprisonment, or otherwise for the breach of laws passed in relation to any subject within their jurisdiction.*
> >
> > *(17) The administration of justice, including the constitution, maintenance, and organization of the courts, both of civil and criminal jurisdiction, and including also the Procedure in civil matters.*

One interesting aspect of the proposed and eventual union was the nature of authority over the law. Not only was there the division between criminal and civil law, but the framers of the 1867 settlement chose to avoid the American model of parallel federal and state court hierarchies. The exclusive control of criminal legislative authority, undoubtedly, was a key centralizing power for the General

Government. However, it was hardly total. British constitutional practice (and what was otherwise largely adopted in the 1867 settlement) was a fusion of legislative and executive powers (within a government's jurisdiction of legislative authority). That is, wherever a government is granted legislative authority, it is also granted the executive authority to carry out said powers. The Quebec Resolutions deviated from this; they placed legislative power and some executive (administrative) power in the hands of the general parliament, but left significant executive powers with the local legislatures. Crown attorneys, lower court judges, and even county and district court judges were to be appointed by the local legislatures. Further, the power of the central government to appoint judges was limited by the stipulation that they could only do so from the bars of the respective provinces.

> *44. The power of respiting, reprieving, and pardoning prisoners convicted of crimes, and of commuting and remitting of sentences in whole or in part, which belongs of right to the Crown, shall be administered by the Lieutenant Governor of each Province in Council, subject to any instructions he may from time to time receive from the General Government, and subject to any provisions that may be made in this behalf by the General Parliament.*

As well, the key power of the Royal Prerogative of mercy was directed by Resolution 44 to be exercised by the Lieutenant Governors-in-Council (ie provincial cabinets). Ignoring the implications that such a prescription would have regarding the ability of provinces to move away from responsible government to "cheaper" and more "municipal" systems that George Brown envisioned, it attempts to rest executive power in the hands of local governments whose equivalent legislative authority was exclusively in the federal Parliament. Admittedly, there was a provision for the federal government to regulate this power, but it was to ultimately be a question of a significant executive power being exercised by executives responsible to local legislative bodies, even though its equivalent legislative authority was under federal jurisdiction.

There was a conscious desire among even those who pushed for a more decentralized union to avoid the potential horrors (as being contemporarily played out on the battlefields of the US civil war) of "state rights." There was little desire to afford the provinces any independent sovereignty. *However this* does not *mean that such sovereignty was then to be vested federally.* Instead, independent sovereignty was denied to either level of government and was to rest Imperially. This is evident in Resolution 32 which, somewhat strongly, calls upon the provincial law officers to serve and be responsible to the general government in its area of legislative authority. If centralization was implicitly understood as the basis of the Quebec Resolutions, then this provision is largely redundant. Its inclusion reflects the desire to avoid the potential conflict between the general and local governments. This resolution expresses that state functionaries are neither servants of the provincial nor general legislatures, but are servants of the single imperial sovereignty and must serve as this sovereign authority has delegated legislative authority (ie to the general government in its jurisdiction, and the provincial governments in their jurisdictions).

The resolution on judicial appointments to county courts made a specific exception for Upper Canada. This, among many other elements of the Constitutional discussions and settlement of the 1860s reflects an asymmetric approach to Canadian constitutionalism. It reflects why there was such a diversity of understandings of the intent behind confederation. The highly centralized union is that of much of the leadership of the Upper Canadian negotiators who envisioned a highly centralized union against the wishes of the other provinces. However, what the Quebec Resolutions and the subsequent BNA Act did to resolve the conflict between the various sections' asymmetric desires for centralization was not to provide a uniform system that satisfied merely one section's desires and imposed that view unwillingly upon the other sections, but to allow each section its own degree of centralization, as each province saw appropriate. For Upper Canada this meant a reduction of the stature of its legislature (to a single-chambered one) and the transfer of certain executive powers to the general government that were retained by the other provinces. This asymmetry exhibits the degree of centralization desired by each of the various sections, for Upper Canada, whose delegates generally wished greater centralization, the Upper Chamber was abolished, for Lower Canada which wished the greatest autonomy a bicameral Legislature was absolutely paramount, and for the ambivalent maritimes, pre-Confederation bicameral legislatures would persist, with consideration of abolishing them left to the post-Confederation period.[171]

What these Resolutions illustrate is that the Quebec Conference, in forming a federal constitution did so in a way which specifically violated certain British Constitutional practices for the benefit of the provinces and their autonomy. The issue of the implementation of law reflects interesting sub-texts in the resolutions; it reflects how few powers the provinces were truly willing to commonly pool. Despite the powers conferred upon General Government, the powers left in the hands of the provinces covered nearly all the legislative authority that had been exercised in pre-

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[171] Browne, *Documents*, 116.

Confederation Canada. An examination of statutes passed by colonial legislatures in the years before Confederation, the vast majority would fall within the realm of post-Confederation provincial legislative jurisdiction. The division of power over law reflects an extreme unwillingness for the provinces to give up their local autonomy. Although contemporarily, and in the present-day, the exclusive control of the federal government over criminal legislation is seen as a strong power of the central government, the Quebec scheme violated the British constitutional principle that the body which passes legislation over a certain jurisdiction is equally responsible for the execution of such laws (the Imperial Government passes empire-wide legislation and executes it, colonies pass legislation and execute it, municipalities pass bylaws and enforce them, etc). The Quebec scheme violated this principle by having the provinces execute legislation of the general government. Thus, even though the provinces alienate legislative powers to the general government, they deny the general government the autonomous ability to implement such powers and instead lodge such execution with the provinces themselves. Further, this principle was not applied narrowly, but in criminal law, in granting of pardons, and in the composition of legislative bodies. Essentially, the Quebec scheme (and aspects of the eventual BNA Act) denied the general government fully responsible government. British responsible government requires that the executive body be responsible to the legislative body of the laws it implements; under the Quebec scheme, the executive bodies charged with carrying out certain tasks were not responsible to the legislative bodies which defined those tasks.

V

A point that I belabour throughout this essay as being present at every point during the creation of the 1867 constitutional settlement is the steadfast adherence to the recognition of the provinces as pre-existing polities to the Dominion. These polities were not simply recreated with Confederation but are equally continuous post-Confederation. Such conceptions not only exist in the preambulatory or introductory resolutions of the Quebec Resolutions (Resolutions 1 to 3), but also find their expression throughout the document. There are often indirect references to the provinces as pre-existing and continuous bodies. For example Resolution 64 refers to the provinces as "transferring" certain powers (in this case) of taxation to the general government.[172] Resolution 41 clearly maintains that "the local government and legislature of each Province shall be constructed in such a manner as the existing legislature of such Province shall provide." This resolution is a far cry from the claim that the Quebec Conference viewed the provinces "not as continuations of the existing provinces, but as virtually new political entities"[173] to be created as the result of the new union. Instead it reflects the belief of many of the delegates that Confederation was to be largely an alliance of provinces, negotiated as a "treaty" among them. This resolution was not pre-planned by the Canadian delegation to Quebec, but rests with a motion by Brown "made merely to elicit opinion of the conference."[174] Brown moved "that in the Local Government there shall be but one Legislative Chamber" and had argued that he wished to abolish responsible government in the local bodies.[175] However, Cartier immediately responded that he "entirely differ[s] with Mr Brown['s]" proposal.[176] What followed was a debate which revealed an incredibly varied understanding of the foundations of what the new union would entail. Every delegate who spoke presented a different shade of opinion between those advocating provincial "sovereignty" such as Chandler; to those, such as Brown who wished the provinces would be new, limited, and subservient bodies to the new incorporating colony. The result was a compromise resolution which would be largely expressed as Resolution 41 which conceded that local governments would likely need to be altered, but such alteration would be decided by those bodies

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[172] The financial position of the provinces, was not nearly emasculated as it is often proclaimed. Lands, mines, and minerals were retained to the provinces which provided significant revenue as well as giving provinces vast control over the development of "trade and commerce" in the province. Further, the Quebec Resolutions protected the revenue from these sources by forbidding the taxation of the lands held by governments. The federal government, thus, could not even indirectly access these resources. As well, the Quebec Resolutions provided more than mere "direct taxation" to the provinces, but allowed for the unlimited application of export duties upon natural resources. The transfer of properties to the central government also had little effect on provincial net revenues given the nature of the public works transferred to the General Government.

Although technically assets, the transfer of items such as "military roads," "armouries, drill-sheds, military clothing, and munitions of war," "ordinance property" and "lighthouses" never produced any revenue for the Provinces and despite having some property value were merely costly liabilities, that could not be abjured. A second class of properties transferred to the General Government – such as "custom houses," and "post-offices" – only ever produced revenue because of the services provided therein. These services would be controlled by the proposed General Government after confederation, but remained vital buildings which would continue being significant maintenance liabilities in excess being assets to the new proposed General Government. The third class of properties transferred to the General Government were revenue producing properties such as "canals," "public harbours" "river and lake improvements," and railways." Although these assets directly produced revenue and could potentially produce net positive revenue for the body controlling them; maintenance costs often consumed more than the revenues they produced. Since British North American railways and canals had to compete with more efficient parallel railways and canals in the United States; any attempts to make them significantly revenue positive would render them uncompetitive and therefore even more net revenue negative. As well, a large number of such improvements would better fall in the above first defined category, as they were essentially non-commercial, but had to be maintained for defensive purposes.

Thus, despite the transfer of such "assets" to the general government, and the paper value and potential credit-improvement of having them in the hands of the General Government, the actual revenue derived from the property assets of the provinces after the transfer of assets was hardly diminished and their liabilities in these areas were significantly reduced.

[173] Creighton, *Road to Confederation*, 163

[174] Browne, *Documents*, 114

[175] *ibid*, 75 and 113-114

[176] *ibid*, 114.

themselves, and neither imposed by the new general government, nor even this conference.

Although I argue the extreme importance of the ability of the provinces to amend their constitutions and the specific denial of that power to the General Government, its inclusion in the Quebec Resolutions is somewhat of a double edged sword, and like so many of the decentralizing elements of the Resolutions, admittedly it was a compromise. Although it was a significant power that was retained by the provinces and denied to the General Government, it was also a potential mechanism to diminish the provinces. Whereas the constitution of the General Government was a "permanent enactment"[177] consented to by all the provinces whose power, although could not be augmented without the consent of the enacting partners, neither could its powers be similarly diminished without such consent. Thus, if one or a non-unanimous combination of Provinces thought that the union was to be further centralized, it could not be altered to suit them. Provinces, however, could almost legislate themselves out of existence under the Quebec Resolutions. Despite this, however, the important point is that such a circumstance could only occur if the legislature itself decided upon such a measure – the "*existing* legislature" shall construct the "local government and legislature." In fact, although the BNA Act prohibits such measure, there is nothing in the Quebec Resolutions preventing provinces from abolishing every aspect of the local constitution including the office of the Lieutenant Governor altogether (so long as the Lieutenant Governor agrees).

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[177] Lord Carnarvon, *Debates*, 562

This issue of provincial constitutions clearly reinforced that the provincial governments are not merely pre-existing, but strongly continuous post-Confederation. Although Creighton claims that the use of the term "Lieutenant Governor" as an investing of an "old word and phrase… with a new, but cloudy and imprecise meaning"[178] such an interpretation purposely ignores the conscious choice to use that title and the specific understanding of what that title held and would mean for the nature of post-Confederation provinces. An examination of the first draft of the BNA Act replaced the name "Lieutenant Governor" with "superintendent." This draft quite evidently was an attempt at centralization to create truly subservient provinces closer to the New Zealand model of 1852 and the replacement of "Lieutenant Governor" by "superintendent" was a necessarily consistent substitution.[179] The term "superintendent" suggests subordination, whereas "Lieutenant Governor" suggests autonomy. The refusal of the delegates to the London Conference to accept the term "superintendent" and the lack of such a substitution in either the Quebec Resolutions or any other of the drafts of the BNA is a reflection that the delegates and draftsmen were quite conscious of the importance of such a title. The use of the term "superintendent" would have expressed subordination to them, and this was not what was widely intended among the delegates. The office of the Lieutenant Governor (like everything else) was a compromise between those who wanted nothing more than a mere superintendent and those who wanted almost entirely autonomous provinces and argued for the continuance of direct Imperial appointment of Provincial Governors.[180]

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[178] Creighton, *Road to Confederation*, 163

[179] Browne, *Documents*, 256

The resolution regarding Lieutenant Governors directed that they be appointed federally while retaining the pre-Confederation title of "Lieutenant Governor" thus retaining for the office a similar function and status and largely continuous with their pre-Confederation functions and status; with Imperial contact regulated by the Governor-General. However, although the loss of direct Imperial appointment was perceived as a diminution of status in the Maritimes, this was not the case for Lower Canada, which understood that the new Province of Quebec would now have a French-Canadian executive officer instead of an Anglo-protestant one. Further, although Governor-General-in-Council was charged with the appointment of Lieutenant Governors, the Quebec Resolutions are effectively silent on the role of the Lieutenant Governors and the role of Governors-General. In the matter of reservation and disallowance of provincial legislation the Resolutions (specifically resolution 51) are silent on how such powers are to be exercised: that is by the cabinet of the General Government, or by the Governor-General as an Imperial Officer.[181] The BNA Act lodges such power with the Governor-General as an independent Imperial Officer not as the automatic tool of the Canadian Cabinet;[182] Quebec Resolution 51 simply does not clarify.

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[180] *ibid,* 115

[181] BNA Act, section 90. See Appendix A.

[182] See Appendix C

What was produced at Quebec was effectively a union that guaranteed a high degree of autonomy to the provinces. The proposed union maintained the provinces as the constitutional foundation of the new union, yet without conceding "states rights." The powers conferred upon the new government were considerably those powers that were simply not exercised before the 1860s. When adopting this division, the proposed union did violate the principle of co-ordinate "sovereignty" (or "legislative jurisdiction), it generally did so in favour of the provinces.

Chapter 5

The London Resolutions

> *In the time of war or tumult the armed force of British North America should be one under one supreme command... in time of peace their commerce, their post, their great lines of communication, and, with due regard to local usage, their civil and criminal jurisprudence should be governed by the same rules.*[183]

In 1865, after the receipt of the Quebec Resolutions, the Colonial Secretary outlined to the Governor-General of Canada five key issues of concern to the Home Government in British North America. Two of them dealt with the issue of defence and were of the most paramount concern; the others were the proposed confederation, maintenance of the system of reciprocity with the United States, and control of the "North-western Territory."[184] In the correspondence conceiving the creation of a British North American union there is discussion of pushing for a closer union, but such comments are drowned in a sea of those who stress the need for some system (any system) of common defence among the British American provinces. The Colonial Office was to "urge with earnestness and just authority the measures which they consider to be most expedient on the part of the Colonies with a view to their own defence."[185] Expediency in creating a union that would provide for defence was significantly more important that creating a union that reflected a desire for a perfectly centralized colony.

The Quebec scheme fulfilled this primary purpose even if it did not fulfill an ideal:

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[183] Carnarvon to Dundas (no. 3) 19 January 1867, *Correspondence*, 137.
[184] Cardwell to Monck (no. 95) 17 June 1865, *Correspondence*, 44.
[185] Cardwell to MacDonnell (no. 29) 24 June 1865, *Correspondence*, 80.

> *It thus appears that the scheme adopted by the Conference at Quebec, and approved by Her Majesty's Government, on the ground, among others, that it was eminently calculated to render easier and more effectual the provisions for the defence of the several Provinces.*[186]

As the delegates assembled for the London Conference, the British Government, as illustrated by its colonial correspondence, wished that the delegates would form a plan of union that provided for defence and created a closer union. However, they were quite aware "of the difficulties which must attend any attempt to consolidate in one body politic a variety of Provinces whose habits, laws, and interests must be in many respects different, and in some perhaps not wholly compatible,"[187] and would thus accept any plan of union that the delegates produced so long as the key issue of defence was addressed.

As most commentators have noted – and as I would agree – the London Resolutions were largely congruent with the Quebec Resolutions. However, the interpretation that the London Resolutions submitted to the Imperial Government "on Boxing Day 1866" were "the Quebec Resolutions virtually unchanged"[188] is an exaggeration. It is true that the vast majority of changes in the London Resolutions from the Quebec Resolutions were largely cosmetic such as the word "union" being replaced by "confederation." There were nonetheless a number of significant alterations. I in no way challenge that the Quebec Resolutions formed the philosophical base of both the London Resolutions and the final BNA Bill – Lord Carnarvon stated as much when introducing the Bill to the House of Lords. However, the limited degree of changes between the London and Quebec Resolutions has resulted in the London Conference being treated summarily; it is often assumed that more "play"[189] than work occurred at this conference (even more so than at Quebec).

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[186] Cardwell to Gordon (no. 66) 12 April 1865, *Correspondence*, 117.
[187] Carnarvon to Dundas (no. 3) 19 January 1867, *Correspondence*, 137.
[188] Saywell, *Lawmakers*, 8

The general tenor of the Colonial Office's preference for the nature of the union, the tenor of the London Conference, and (to a limited degree) the tenor of the London Resolutions was the strengthening of the central government at the expense of the provinces. The point that I will illustrate is that despite the centralizing desires of the Colonial Office and the centralizing agenda of the London Conference, the London Resolutions and the final BNA Bill retained the considerable degree of decentralization present in the Quebec Resolutions. Although there was great pressure upon the delegates to centralize the union and some concessions were made, the result was resolutions that maintained the same tone and general distribution of powers such that most authors have identified them as being "virtually identical" to the Quebec Resolutions.

II

The problem with attempting to analyze the London Conference is that the extant records of its proceedings are wanting. Large sections of the minutes and proceedings of the Conference are simply unavailable. My analysis of the London Resolutions, therefore, rests on three bases: the differences between the published Quebec Resolutions and the published London Resolutions, implications of the records of which Quebec Resolutions were either "passed" or which were "stood over," and finally those limited records of what transpired at the conference.

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[189] *ibid*

Of the significant changes that I would identify between the Quebec and London Resolutions, regarding relative power of the governments in the proposed Confederation, only one could be considered decentralizing with seven others being centralizing (and an eighth that is *potentially* centralizing).

The single decentralizing change is a relatively limited one which places "Lands set apart for public purposes" as part of Quebec Resolution 55. This resolution, which would transfer provincial properties and liabilities to the proposed General Government, was changed from its own enumerated head (no. 11) to being a portion of the enumerated head of "Armouries, drill-sheds, military clothing, and munitions of war" (no. 10). Whereas "Lands set apart for public purposes" as a separate enumerated head could potentially result in a massive transfer of provincial land holdings to the proposed General Government; its appearance in the London Resolutions generally limits its scope to lands set aside for the purpose of defence.

The addition to the London Resolutions cited most often is the "power of last resort to legislate" by the General Government on "separate or dissentient" schools if the rights of local minorities were violated (this appears in the BNA Act as Section 93).

> *41(7). Education, saving the rights and privileges which the Protestant or Catholic minority in any Province may have by law as to denominational schools at the time when the Union goes into operation. And in any Province where a system of separate or dissentient schools by law obtains, or where the Local Legislation may hereafter adopt a system of separate or dissentient schools, an appeal shall lie to the Governor-General in Council of the General Government, from the acts and decisions of the local authorities, which may affect the rights or privileges of the Protestant or Catholic minority in the matter of education. And the General Parliament shall have power in the last resort to legislate on the subject.*

This amendment was made largely to placate the concerns of the Anglo-protestant minority in Lower Canada which feared that its rights could be abrogated by the largely francophone Catholic Lower Canadian (Quebec) legislature. The interesting element of this addition is its reflection of the perceived weakness of the General Government as created under the Quebec Resolutions. The Anglophone protestant minority in Lower Canada understood the Quebec scheme as granting such a degree of autonomy to the Lower Canadian legislature that a specific grant of legislative power had to be given to the General Government, lest they have no effective avenue of appeal. The powers of the provinces were seen as being so exclusive, so sacrosanct, that the provisions of the General Government to legislate on "peace, welfare, and good government" along with (potentially) "generally respecting all matters of a general character not specially and exclusively reserved for the Local Legislatures" as well as the power of disallowance and reservation were not seen as being adequate to protect their rights such that a specific legislative grant had to be made.

Although often forgotten when reflecting on the Quebec and London Resolutions, perhaps the single most centralizing alteration at London was the striking of Quebec Resolutions 23 and 24, removing the power of Provincial legislatures to define and alter the constituencies of the general legislature. These resolutions were an importation from American federalism which largely violated British parliamentary traditions and granted potentially immense powers to the local legislatures over the General Government. However, despite the centralizing nature of these revisions to the Resolutions, there is no certainty that they were removed out of an attempt at centralization. The limited extant records state that resolution 23 was "to be modified" and that resolution 24 was to be "struck out. See 41,"[190] but the reasons for such are not recorded. It is true that the threat of federal ridings being dismantled by provincial legislatures as an attack against a federal MP and the General Government did arise as critical during the colonial debates, yet the Resolutions' incongruity with British Parliamentary practices could have easily been the decisive factor in their removal.

It is also oft forgotten that the taxation powers of the provinces were not as limited in the Quebec Resolutions as they were in the BNA Act. It was only at the London Conference that the power of imposing export duties on natural resources was rescinded:

Quebec Resolution 43(1) *Direct taxation and the imposition of duties on the export of timber, logs, masts, spars, deals, and sawn lumber, and of coals and other minerals.*	London Resolution 41(2) *Direct taxation, and in the case of New Brunswick the right of levying timber dues by the mode and to the extent now established by law, provided such timber is not the produce of the other Provinces.*

Again, the records of this discussion are limited, but it is important to note that an exception was nonetheless continued for New Brunswick timber. (It is also interesting to note that this power was re-instated among the 1982 constitutional amendments.)

The General Government's ability to appoint judges was expanded to include all District and County courts across the proposed union (London Resolution 33). This was an expansion of a power already conceded in Upper Canada. Doing so reduced the inconsistency between federal legislative jurisdiction and provincial administrative jurisdiction, but it hardly repealed it.

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[190] Browne, *Documents*, 215

One other change from the legislation and administration of law in the Quebec Resolutions at London was the insertion of "including the solemnization of marriage" into Resolution 41(15) (which appears as 92(12) in the BNA Act). The origin of such change likely resulted from the desire of Lower Canada, with its Catholic majority population, to control the rites of marriage.

"Sea coasts and inland fisheries" was removed as a concurrent power and placed exclusively in the hands of the General Government (London Resolution 28(15)). As I will argue below[191] this effectively transferred it from an area of provincial jurisdiction to federal jurisdiction. The existence of this resolution as a concurrent power would have caused considerable headaches as to what would have been appropriate federal intrusion into this area. Seacoast and inland fisheries have the unfortunate role of being both natural resources (which were to rest exclusively in provincial hands) and maritime issues (an exclusively federal jurisdiction). It appears that the conference chose to make any and all maritime issues an exclusively federal jurisdiction (also noted by the inclusion of "Sable Island" under federal jurisdiction) at London.

The power of Lieutenant Governors to exercise the prerogative of mercy was removed in the case of capital cases (London Resolution 43). Its inclusion at all is somewhat curious given that the Colonial Office and various Governors had commented on its possible unconstitutionality.[192] The refusal of the Conference to wholly remove this clause (which was duly removed by the Colonial Office in drafting the BNA Bill) is again indicative of how strong localist sentiment was, despite its unconstitutionality.

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[191] See *infra* Chapter 6, Section IV, pp. 134-136.

The London Resolutions also added that the "powers and privileges" of the British Houses of Parliament would be held by the Houses of Parliament of the new General Government (London Resolution 30). This power, although largely administrative, could be interpreted as centralizing, as it could be conceived as granting the Parliament of Canada greater stature than the provincial parliaments who were not directed by the resolutions to have the same power.

III

Of the Quebec Resolutions that were not simply "passed" by the London Conference, but which were "stood out" and further debated, only the above listed resulted in any substantive change. A general analysis of the changes made at the London Conference and those Quebec Resolutions which were not simply "passed" but "stood over" and debated by the London Conference, again, likely indicate a largely centralizing attempt at the Conference. The topics chosen to discuss, if altered, could have had significant effect upon the distribution of relative power in the union. The vast majority of the resolutions that were "stood out" relate directly to the transfer of assets and liabilities (Quebec Resolutions 43(10), 55(8), 55(11), 58, 59, 61, 62, 67) or relate to such transfers but also have significant other implications, such as revenues from lands and minerals (Quebec Resolutions 43(1), 43(7), 56, 57), Grants-in-Aid to the Provinces (Quebec Resolutions 64 and 65), or payment of government officers (Quebec Resolutions 33 and 39).

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[192] Edward Cardwell, "Despatch from the Right Honourable Edward Cardwell, M.P., to Viscount Monck" (3 December, 1864) from *Irish University Press series of British parliamentary papers. Colonies: Canada* vol. 26, 447-448.

The definition of the Lieutenant Governor (Quebec Resolution 38) and the "Name and Rank" of the Union (Quebec Resolution 71) were also raised at the London Conference. Changes to these could have had both very symbolic and substantive effects to the relative autonomy of the two levels of government. Although the decision not to call the new entity either a Kingdom or a Viceroyalty is usually explained so as not to irritate the Americans by placing a poignantly monarchical entity on their northern border, the decision not to do so, whether intentionally or inadvertently, aided in securing the autonomy of the provinces. Under British Constitutional Law a "Kingdom" or a "Viceroyalty" is essentially sovereign, and its chief executive can exercise certain rights of royal prerogative that a mere "Governor" cannot.[193] Granting such a title to the union would symbolically subordinate the province to such a degree that it would have immense practical implications. Instead the chosen title, "Dominion" was a wholly new term that had no pre-existing connotations and was thus a "cloudy and imprecise"[194] term. As stated in my commentary on the CLVA,[195] the term in and of itself was thus meaningless, or – more precisely – self-creative of meaning. Being neither the old status of "colony" nor the other superior – but familiar – titles of "Kingdom" or

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[193] See *Cameron v. Kyte* [(1835), 12 ER 679] and note 138 at *supra* 81.

[194] A term borrowed from Creighton, *Road to Confederation*, 163.

[195] See *supra* Chapter 3, section IV, pp. 78-82.

"Viceroyalty," a unique political arrangement in the Empire was created that signified a more dignified, but not truly superior, system of government than "colony."

There was an evident attempt to centralize the proposed Union at the London Conference, spurred not only by delegates such as John A. Macdonald, but by the Colonial Office as well.[196] Nearly every aspect of the scheme which could have resulted in greater centralization of the union was raised and discussed at London and of those changes made nearly every one of them increased the powers of the central government relative to the possible powers of the provinces. However, what should be noted is that despite the remarkably strong attempt to centralize the Union and the pressure of the Colonial Office to create a more centralizing union, the attempt was largely resisted. The above exploration of changes at the London Conference illustrate just how little was changed despite vigorous efforts to do so, and the changes which did occur were generally those that either increased the consistency and uniformity of the distribution of powers or reduced transgressions of British constitutional traditions. Centralization was the evident agenda of the London Conference, but its forceful attempt is glaring primarily for its failure. The London Resolutions merely illustrate that the Colonial Office was going to be obligated to create a decentralized union as the only consensus that could be reached by the colonial delegates.

The correspondence emanating from the Colonial Secretary[197] after the receipt of the Quebec Resolutions in 1864 is consistent with a desire for a more centralized union, with even discussion of an outright incorporating union being urged. As Saywell's research indicates,[198] there were even suggestions of recreating British North America on almost identical terms as to the internal arrangement of Great Britain, with similar protections for Lower Canada as contemporarily existed for Scotland under the Act of Union (which had its own unique legal system, church, etc).

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[196] See also Saywell "Backstage"

[197] Edward Cardwell from 1864 to July 1866 and Henry Howard Molyneux Herbert, Earl of Carnarvon from July 1866 to March 1867

However, the correspondence equally demonstrates that despite the urging of the Colonial Secretary, the colonials' attitude remained steadfastly attached to the decentralized Quebec scheme. What the correspondence progressively emphasizes is that so long as the system made provision for a common system of defence, the Colonial Office would accept any plan of union. Further, the Colonial Office is revealed to be utterly unwilling to press any form of union that would derail the contemporary momentum towards some sort of Union that would provide for the common defence of British North America.

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[198] See Saywell, "Backstage."

Chapter 6

Lord Carnarvon's "Largest and most Important Measure"

> *Federation is only possible under certain conditions, when the States to be federated are so far akin that they can be united, and yet so far dissimilar that they cannot be fused into one single body politic. And this I believe to be the present condition of the Provinces of British North America. Again, it is said that federation is a compromise, and like all compromises, contains the germ of future disunion. It is true that it is a compromise so far as it is founded upon the consent of the Provinces; it is true that it has been rendered possible by the surrender of certain powers, rights, and pretensions by the several Provinces into the hands of the central authority; but it is also to be remembered that – unlike every other federation that has existed it derives its political existence from an external authority, from that which is the recognised source of power and right – the British Crown. And I cannot but recognise in this some security against conflicts of State rights and central authority which in other federations have sometimes proved so disastrous.*
>
> ...
>
> *We are laying the foundation of a great State – perhaps one which at a future day may even overshadow this country. But, come what may, we shall rejoice that we have shown neither indifference to their wishes nor jealousy of their aspirations, but that we honestly and sincerely, to the utmost of our power and knowledge, foster their growth, recognising in it the conditions of our own greatness.*[199]

Canada lacks the mythos surrounding our constitutional order that is prevalent among many other modern societies, yet Canada is perhaps legitimately deserving of such a mythos. One can trace an "Aristotelian" or a Rousseauean "lawgiver" for Canada; he has merely been forgotten (if he was even ever remembered). Lord Carnarvon was Colonial Secretary during the passage of the BNA Bill (he was to resign from Cabinet shortly after its passage over the proposed Reform Bill). It was with him that the final question of the nature of the new union was to rest, and it was he who introduced and explained this colonial constitution before the House of Lords.

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[199] Lord Carnarvon, *Debates*, 576a-576b

Despite John A. Macdonald's complaint that Confederation was treated by the British Parliament as though it were "to unite two or three English parishes,"[200] Lord Carnarvon's speech is a testament to the fact that the Colonial Office had carefully considered the nature and repercussions of the proposed British North American union. When Lord Carnarvon began his speech describing the British North America Bill during its second reading before that the House of Lords he argued that he was about to present "one of the largest and most important measures which for many years it has been the duty of any Colonial Minister in this country to submit to Parliament."[201] The lack of any considerable Parliamentary debate was at least partially due to the non-partisan nature of the British North American union among British Parliamentarians, as Lord Carnarvon would comment in his speech before the Lords:

> *I would wish to bear my testimony – whatever it may be worth – to the ability and patience with which my right hon. Predecessor in the Colonial Office, Mr. Cardwell, laboured to effect the consummation of this work.*[202]

This speech has been largely forgotten in Canada's constitutional history. Recently Garth Stevenson has quoted this speech,[203] but, like Donald Creighton in his *Road to Confederation*,[204] it is only briefly mentioned and both authors comment upon and quote the closing section of the speech where Lord Carnarvon waxes about the potential aggrandizement of the new Dominion. Before this citation, a short selection from Lord Carnarvon's speech appeared in a 1938 Report to the Senate[205] among a very extensive collection of Canadian Constitutional Documents in its fourth annex, but O'Connor's selections are limited and largely unrepresentative of the speech.

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[200] Cited by Vaughan, *Canadian Federalist Experiment*, from R.M. Dawson, *The Government of Canada* (Toronto: University of Toronto Press, 1954).
[201] Lord Carnarvon, *Debates*, 557 (19 February, 1867)
[202] *ibid*
[203] Garth Stevenson argues in *Ex Uno Plures: Federal-Provincial Relations in Canada 1867-1896* (Montréal: McGill-Queen's University Press, 1993), 22.
[204] Creighton, *Road to Confederation*, 426-27.

II

Carefully selected citations from Lord Carnarvon's speech can produce examples that Lord Carnarvon intended the BNA Act to create a centralized union, as the aforementioned authors have done:

> *One single system of English law and commerce and policy extend from the Atlantic to the Pacific.*[206]
>
> *The real object which we have in view is to give the Central Government those high functions and almost sovereign powers by which general principles and uniformity of legislation may be secured in those questions that are of common import to all the provinces.*[207]
>
> *I ought to point out just as the authority of the Central Parliament will prevail whenever it may come into conflict with the Local Legislatures so the residue of legislation, if any, unprovided for in the specific classification which I have explained, will belong to the central body.*[208]
>
> *We are laying the foundation of a great State.*[209]

Of these quotes, Stevenson and Creighton cited the final one and O'Connor the second and third. What is interesting about the O'Connor *Report* is the high degree of selectiveness in his quotations from Lord Carnarvon's speech. In general, this report contains an extensive collection of documents, but O'Connor only quotes two columns of a twenty-one-column speech. Further, from the small portion that he did quote, he selectively cut out a section which stated that the new confederation was to "combine considerable local powers with a general Government at the centre."[210] These four above sections are the only points in the speech that hint at an overwhelmingly powerful central legislature, whereas the language of Confederation as a pact of consenting provinces wishing to retain autonomy permeates the whole of the speech:

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[205] O'Connor, *Report*, Annex No. 4, p. 76.
[206] Lord Carnarvon, *Debates*, 558
[207] *ibid* 563
[208] *ibid* 566
[209] *ibid* 576b

> *The British Provinces in North America were, as I have said, consenting parties and the measure founded upon them must be accepted as a treaty of union.*[211]
>
> *The bill opens by reciting the desire of the several provinces to be federally united.*[212]
>
> *It is the desire of the Provinces to retain their separate and individual organization.*[213]
>
> *The several contracting parties.*[214]
>
> *Provide for a permanent representation and protection of sectional interests.*[215]
>
> *Whilst the provisions regulating the constitution of the central Parliament are in the nature of permanent enactments, those which govern the Local Legislatures will be subject to amendment by those bodies.*[216]
>
> *If, on the one hand, the Central Government be too strong, then there is risk that it may absorb the local action and that wholesome self-*

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[210] ibid 564
[211] *ibid* 558
[212] *ibid* 559
[213] *ibid* 559
[214] *ibid* 560
[215] *ibid* 560
[216] *ibid* 562

> *government by the provincial bodies, which is a matter both of good faith and political expediency to maintain.*[217]
>
> *Retain[ing] for each Province so ample a measure of municipal liberty and self-government.*[218]
>
> *Combin[ing] considerable local powers with a general Government at the centre.*[219]
>
> *[A] compact between the several provinces.*[220]
>
> *It is with these feelings and on these terms that Lower Canada now consents to enter this Confederation.*[221]
>
> *All local works will devolve upon local authorities, who in turn will be responsible to the taxpayer.*[222]

The references in Lord Carnarvon's speech to the new Confederation as a seemingly highly centralized Union are an expression of a desire for "uniformity" over "centralization." Of course, it might seem to many that the automatic corollary to uniformity is centralization, but this is not the case for what Lord Carnarvon envisioned. Uniformity was only to be legislated upon by a central legislature for "those questions that are of common import to all the provinces,"[223] which was to include those things of "a military, a commercial, [and] a material point of view."[224] Here one could argue that "commercial" and "material" elements were intended to be all encompassing, but these were actually limited grants meant to fill a specific void, as "there [was] no uniformity of banking, no common system of weights and measures, no identity of postal arrangements, [even] the very currencies differ."[225]

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[217] *ibid* 563
[218] *ibid* 563
[219] *ibid* 564
[220] *ibid* 567
[221] *ibid* 568
[222] *ibid* 573
[223] *ibid* 563
[224] *ibid* 576

This is not to say that greater uniformity was not eventually envisioned and that "perhaps… one single system of English law and commerce and policy [would] extend from the Atlantic to the Pacific."[226] However, "the desire of the Provinces to retain their separate and individual organization"[227] was treated as essentially sacrosanct and such uniformity would only come with the explicit consent of the provinces. This conception, embodied in section 94 of the BNA Act, made the provision for the General Government to legislate for the uniformity in laws relating to property and civil rights in the English common-law provinces, but only with the consent of the provincial legislatures.

Further, this uniformity made numerous explicit exceptions for Lower Canada (again, as embodied in section 94). Lord Carnarvon refers to the post-Confederation maintenance of Lower Canada's "national institutions."[228] Lower Canada "will enter this Union only upon the distinct understanding that she retains" "her ancestral customs and traditions" as well as "her peculiar institutions."[229] Even the possibility of Quebec (uniquely) to be integrated into the broad common system of law was not envisioned, and Quebec, *uniquely*, was to remain distinct. *Asymmetry is not merely a* de facto *development in present-day Canada reflecting Quebec's distinctiveness, but*

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[225] *ibid* 574
[226] *ibid* 558
[227] *ibid* 559
[228] *ibid* 568
[229] *ibid* 568

was specifically envisioned by Lord Carnarvon and the Colonial Office in crafting the BNA Act.

Although Guy LaForest has cited section 94 along with section 133 (the provision for the use of French and English in the legislatures and Courts of Canada and Quebec) as the basis of dualism in the BNA Act,[230] these are only the most explicit provisions for dualism in the BNA Act. The provisions for the creation of Canadian institutions are generally paralleled in provisions for constituting Quebec: the provisions for the legislative council of Quebec are perfectly parallel with those for the Canadian Parliament, but not for any other Province. Obviously, the need for the Legislative Council reflected the desire to protect the 'sectional' interests of the Anglo-protestant minority in Quebec, but its symbolism is also very substantive. Unlike Ontario, Quebec was to have a full Parliament of Crown, 'Lords,' and 'Commons;' and seat of the Government of Quebec was to uniquely maintain an official residence of the Crown for Canada outside of Ottawa.

The distinct status of Lower Canada was not presented as a mere accident of history that was being accommodated in a symmetric federation for Lord Carnarvon, but Lower Canada was recognized as having a legally unique (and arguably dualist) relationship to Canada by virtue of the nature of her conquest by the British Crown:

> *Lower Canada, too, is jealous, as she is deservedly proud of her ancestral customs and traditions; she is wedded to her peculiar institutions, and will enter this Union only upon the distinct understanding that she retains them. The 42nd Article of the Treaty of Capitulation in 1760 when Canada was ceded by the Marquis de Vaudreuil to General Amherst, runs thus—*

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[230] Guy LaForest, "Standing in the Shoes of the Other Partner in the Canadian Union," *Beyond the Impasse: Toward Reconciliation* (Montreal, 1998), pp. 51-79.

> *Les François et Canadiens contioneront [*sic*] d'être gouvernes suivants la Coutume de Paris et les loix et usages établis pour ce pays.*[231]

> *The* Coutume de Paris *is still the accepted basis of their Civil Code, and their* national institutions *have been alike respected by their fellow subjects and cherished by themselves, and it is with these feelings and* on these terms that Lower Canada now consents *to enter this Confederation."*[232]

Lord Carnarvon viewed Lower Canada as a *nation* distinct from the Anglo-British nation that inhabited the rest of British North America. Quebec was to be a nation within Confederation with institutions that would be "respected by their fellow subjects" as being distinct from their own.

Thus, there seems to be a contradiction in this speech. Lord Carnarvon seems to advocate "one single system of English law and commerce and policy"[233] governed by a "Central Government [with] those high functions and almost sovereign powers"[234] which would further subordinate the provinces to the will of the Central Parliament in nearly all matters, since Lord Carnarvon pronounced that "the Central Parliament will prevail whenever it may come into conflict with the Local Legislatures so the residue of legislation, if any, unprovided for in the specific classification which I have explained, will belong to the central body."[235] These statements are contradicted by frequent references to the union as a "contract" or "treaty of union" among "consenting parties" intent on the "protection of section[al] interests" by provinces with "considerable local powers" that "desire… to retain their separate and individual organization" and aiming to prevent the "risk that it [the central government] may absorb the local action and that wholesome self-government by the provincial bodies."[236] The contradiction is, however, more apparent than real, for the supposed strong powers of the central government are not merely outweighed by the more frequent references to strong local autonomy, but are also otherwise significantly qualified in the speech.

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[231] "The French and Canadians shall continue to be governed according to the custom of Paris and the laws and usages established for this country" [my translation]

[232] Lord Carvanon, *Hansard*, 568[emphasis added].

[233] *ibid* 558

[234] *ibid* 563

[235] *ibid* 566

The vision of "one single system" is qualified by its scope being limited to the "military," "commercial" and "material" matters, and even those would be further qualified by Quebec's retention of distinct "national institutions." "One single system" was only a "vision," not merely because the Northwest and British Columbia (as well as Prince Edward Island and Newfoundland) were yet to enter the union, but because such uniformity would have to be accepted by the provinces. Uniformity was not to be imposed centrally, but instead it would rest upon "time and the prevailing strength of" the federal government's "*principles*, to induce the provinces to adopt that which is most consistent with [general] policy, and, as I believe, with *their* interests."[237] Confederation was to provide a framework in which uniformity could be achieved, not a bludgeon with which it was to be forced: Confederation was a reorganization, not a reconstitution.

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[236] *ibid* 563

[237] *ibid* 570-71 [emphasis added]. This passage was actually in reference to the new Dominion adopting the commercial policy of Britain of free trade, but the same principle applies to the provincial adhesion to federal policy in many areas.

III

> *By adopting this scheme we surrender our independence and become dependant upon Canada, for this federal government will have… an arbitrary veto*[238]

One primary concern of many colonials was the power of the proposed central government to veto provincial legislation on a partisan basis. However, a solution to this issue was found by the Colonial Office (admittedly it never made its way into general practice). In pre-Confederation British North America, the powers of reservation and disallowance existed as a safeguard of Imperial interests in colonial legislatures which were granted otherwise plenary and unlimited legislative power. Instead of enumerating in colonial constitutions what they could and could not legislate upon, the Home Government simply allowed these colonial legislatures to pass whatever legislation they saw fit, and only vetoed such legislation that the Home Government thought inappropriate. With the advent of responsible government, it was a power used sparingly on the understanding the local issues should be of exclusively local concern, and would only be vetoed if a bill impinged the security of the Empire (and a few other issues).[239] For example, although free-trade was the widely held guiding principle of mid-century Britain, the Home Government refused to veto colonial protective legislation (even against Britain), despite vocal metropolitan demands to do so. The right of local legislatures to legislate with unlimited authority on local matters was a key convention of the mid-century empire.

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[238] Robert Thomson in the New Brunswick House of Assembly 1 June, 1865, cited from *Canada's Founding Debates*, ed. Ajezenstat *et al* (Toronto: 2003), 269-70.

[239] See Appendix C, *Instructions to Viscount Monck as Governor-General of Canada* (24 May, 1867).

This practice, for the Colonial Office, was to be continued in post-Confederation Canada.

The method in which veto powers were exercised by the Home Government was to be largely, but not precisely mirrored in intergovernmental relations within Canada. Whereas veto powers of the Home Government were to be exercised by the Queen on the advice of a Secretary of State (the Queen-in-Council), federal veto powers were to be exercised by the Governor General with no mention of any ministers. Canada was Confederated with a "Governor General" who was both "an Officer charged with the duty of protecting Imperial interest named by and responsible to the Crown"[240]as well as a representative of the Crown "acting under the advice of his [Canadian] Ministers." The specific omission of the addendum "in-council" or an equivalent phrase in both the BNA Act and Lord Carnarvon's speech, despite its specific and careful use elsewhere in both the BNA Acts[241] and Lord Carnarvon's speech indicates that vetoing of provincial legislation was not meant to be a merely 'local' (to the Dominion government) concern when the Governor General would act exclusively as a representative of the Crown "with the advice and consent"[242] of his Canadian Ministers, but he would be acting "individually"[243] as an officer of the Home Government. Thus, this exercising of a veto over provincial legislation would not be a partisan matter of federal ministers, but it would instead largely be a non-partisan act by the Governor General protecting Imperial interests.

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[240] Lord Carnarvon, *Debates*, 559

[241] See Appendix C

[242] BNA Act, section 12, see Appendix A

[243] Lord Carnarvon, *Debates*, 559

IV

The nature of enumeration of powers in the BNA Act, as outlined in Lord Carnarvon's speech, was a considerable innovation in federal constitution making for the time and for many decades to come. Federalism was generally understood at the time as a grant of specific enumerated powers to one level government with residual power (and usually sovereignty) left to the other. The Quebec Conference deviated from this pattern by equally enumerating general and local legislative powers. The Colonial Office would then go on to more carefully refine this innovation and leave "residual power" to both levels of government in Canada. Whereas the Quebec Resolutions merely enumerated general and local powers with many dual-listed, Lord Carnarvon (and the BNA Act) more precisely outlined legislative powers into exclusive (federal or provincial), concurrent, and exceptional.[244]

The question of residual power is much less meaningful to Canadian Confederation than in other federations as there was little intended residual power. Further, although the General Government is granted an "ample measure of legislative authority" so too is each province granted "ample measure of municipal liberty and self-government." Through section 92(16) of the BNA Act, provincial legislatures are granted "exclusive" power to legislate on local matters, with the General Government being granted residual power through the "peace, order, and good government" clause. Residual power thus follows the same pattern as enumerated powers; matters of general or common concern are residually left to the

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[244] Arguably the BNA Act contains five categorizations; see *infra* Chapter 7, Section 5, pp. 154-155.

General Government and local concerns are residually left to the provincial governments.

> *The residue of legislation, if any, unprovided for in the specific classification which I have explained will belong to the central body. It will be seen under the 91st clause that the classification is not intended 'to restrict the generality' of the powers previously given to the Central Parliament, and that these powers extend to all laws made 'for the peace, order, and good government' of the Confederation – terms which, according to precedent, will, I understand, carry with them an ample measure of legislative authority.*[245]

Despite the overwhelming appearance of the above passage, it is not as sweeping a grant of centralization as it appears in isolation. As I have stated, in the context of the whole speech this sweeping grant is significantly qualified, and within the words of the above passage it is self-qualified. First, Lord Carnarvon was stating that this residual power was only to be enacted for "unprovided" legislation. Yet this phrase was qualified by his doubt that there was "any" legislation for which there was no provision. The innovation of enumerating the powers of both levels of government meant that there was not intended to be any residual legislation, save for those subjects which would continue to be handled by Westminster.

Second, the phrase "according to precedent" significantly qualifies the statement but does not fully explain that qualification because Lord Carnarvon did not specifically outline this "precedent" in this speech. This unelaborated "precedent" was severely restrictive of the power of "Peace, Order, and Good Government" [hereafter referred to as 'POGG']. The power of "Peace, welfare, and good government" [hereafter referred to as 'PWGG'] (or a slight variation thereof) had appeared in every Canadian statutory constitution (and in the non-statutory Constitution of the *Royal Proclamation*) as well as in every other colonial statutory constitution to date.[246] This grant essentially gave all colonial legislatures plenary or unlimited ability to pass legislation; no specific field of legislation was beyond their capability. The grant of "peace, welfare, and good government" did not, however, make the legislation passed by the colonial legislatures automatically valid. Colonial statutes were only valid insofar as they did not violate Imperial legislation on the same subject. In essence, the all-encompassing nature of PWGG had, according to precedent, rendered it both grand and plenary, but also effectively powerless if any restrictions were created elsewhere. A grant of PWGG stated that a legislature could legislate on anything only so far as another supreme body had failed to legislate on the same issue.

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[245] Lord Carnarvon, *Debates*, 566

What the BNA Act specifically stated was not the significantly more expansive grant "to make Laws for the Peace, Welfare, and good Government thereof such Laws not being repugnant to this Act" as was granted in previous Canadian constitutions,[247] but the significantly more restrictive grant "to make Laws for the

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[246] This is an extrapolation as opposed to a direct citation as the availability of colonial constitutions is somewhat limited. It is precise to say that *every* Canadian and Australian statutory constitution to 1867 contained a variation of the phrase "peace, welfare, and good government." See Appendix D, Use of Terms. Garth Stevenson argues in *Ex Uno Plures: Federal-Provincial Relations in Canada 1867-1896* (Montréal: McGill-Queen's University Press, 1993), 21 that the use of the term "welfare" came from the phrase "common defense and general welfare" in the US constitution and that "order" was the preferred term in the Colonial Office. As Stevenson does not provide any references when making this argument, I do not find the claim compelling. The use of term "Peace, Welfare, and Good Government" in the Quebec Resolutions and its replacement with "Peace Welfare, and Good Government" in the BNA Act does raise many questions, ones which do not seem to ever have been properly explored.

[247] *Act of Union, 1840*: "...to make Laws for the Peace, Welfare, and good Government of the Province of Canada, such laws not being repugnant to this Act..."

Constitutional Act, 1791: "...to make Laws for the Peace, Welfare, and good Government thereof such Laws not being repugnant to this Act"

Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces."

Thus "according to precedent" any "residue of legislation" granted to the "Central Government" were only those areas not already legislated upon by the Imperial or provincial governments. PWGG was indeed a "residuary" power, but "residuary" to the ability of other – greater – authority to legislate on matters, not "residual sovereignty." Whereas the Quebec and London Resolutions had simply granted the General Government the power to legislate for PWGG with no restrictions (other than Imperial sovereignty) and simply stated that the enumerated heads were what it the General Government was to "especially" (but not to necessarily limited what to) legislate upon; the BNA Act clarified this grant by dividing federal legislative power into two categories in the preambulatory portion of section 91. The Parliament of Canada was to have legislative authority "to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces" as the first identified category, with the second category of "the exclusive Legislative Authority of the Parliament of Canada extend[ing] to all Matters coming within the Classes of Subjects next hereinafter enumerated." Thus, the federal government was granted exclusive authority over its

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Quebec Act, 1774: "…shall have Power and Authority to make Ordinances for the Peace, Welfare, and good Government, of the said Province…"

Royal Proclamation, 1763: "…to make, constitute, and ordain Laws, Statutes, and Ordinances for the Public Peace, Welfare, and good Government of our said Colonies, and of the People and Inhabitants thereof, as near as may be agreeable to the Laws of England, and under such Regulations and Restrictions as are used in other Colonies" enumerated heads and residual authority over what had otherwise not been legislated upon by other legislatures. This second category (containing "POGG") essentially granted the federal government legislative authority insofar as there was no legislation on the matter emanating from the Imperial or Provincial governments. The grant of POGG to the Dominion government was the "residue" of "sovereignty" or 'legislative authority' to superior Imperial and/or Provincial legislation, just as the "sovereignty" or 'legislative authority' of PWGG in pre-Confederation Canada was the "residue," and thus limited, sovereignty of the Imperial government's plenary sovereignty.

Further, what limited symbolic value the grant of "peace, *welfare*, and good government" would have had was further reduced by the choice of the atypical term "peace, *order*, and government." Lawyers and statutory draftsmen generally do not change a term that has had prior and consistent use and meaning unless there is an intent to change the interpretation of the phrase or clause. Given that the use of the term POGG was a deviation not only from general historical precedent,[248] but from the specific proposals given to the Colonial Office by the colonial delegates indicates the unwillingness the Colonial Office had in giving truly sweeping powers to the Dominion government. The replacement of the word "order" for "welfare" indicates that the usual plenary power, for what little ("if any") residual power was not enumerated, assigned to colonial governments was even being further restricted for the Dominion government as the term "welfare" had the connotation of dealing with very local matters, but "order" was largely redundant with the term "peace."

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[248] See Appendix D

The division of powers in the BNA Act, Lord Carnarvon's clear understanding of that division, and its significant refinement over the Quebec Resolutions, clearly illustrate that the draughtsmen of the BNA Act and Lord Carnarvon had a keen and nuanced understanding of the construction of this division of powers and a specific intent behind the said division. Since the dual enumeration of BNA was novel, the Colonial Office seemed to foresee potential problems not faced by previous federations (and perhaps hoping to avoid problems which plagued those federations). Thus, Lord Carnarvon outlined quite specifically which powers were to be exercised by which bodies in which circumstances. Lord Carnarvon explicitly outlined which powers were to exercised by which level of government and when exceptions to these rules were to be made. Two of the three concurrent powers, agriculture and immigration "will in most cases probably be treated by the Provincial authorities [as] they are subjects which in their ordinary character are local."[249] Although it might seem anti-intuitive at first that the level of government with paramountcy was not intended to exercise the power, it is actually only logical. For example, if the federal government has paramountcy in a certain field of legislation and legislates extensively on the subject, there will be no place for any provincial legislation since any legislation that the province would pass would in all likelihood be impotent because it would be already covered by comprehensive paramount federal legislation. In this example, however, if provinces were to have extensive legislation on the subject, the federal government could then pass limited countrywide legislation that would automatically apply and be paramount over the different provincial systems.[250] However "a discretionary power of interference is wisely reserved to the Central Parliament" given that Canada is "a young country" in which the General Government may soon be charged with colonizing the country (especially with the possible annexation of the Northwest). [251] The third concurrent power, the power over 'works,' is granted concurrently because although Lord Carnarvon has a clear idea of which works are local and which works are for the "general advantage," he is again aware that the nature of what is "local work" can rapidly change (ie a telegraph line linking two communities being integrated into a general network). In the case of "works" the concurrent power allows for a more extensive federal involvement because despite its "concurrent" classification, the provision was envisioned as being truly parallel instead of concurrent (and probably why scholars have hence not referred to it as a concurrent power). The federal government would have control over 'national,' inter-provincial, and extra-Dominion works with the provincial governments having control over local works. The Colonial Office, cherishing the idea of theoretically unlimited government, simply did not want to create inflexible rules defining what exactly were "national" works. For example, a canal which connects two towns, but does not connect to any other towns is hardly part of a "national" system that would be of proper concern to the federal government. However, if one of those towns were to be connected to a 'national' or inter-provincial network of canals, then it suddenly become a 'national' concern.[252] Further, it should be noted that this third concurrent power is granted differently than the other two in the BNA Act. Whereas agriculture and immigration are made concurrent under section 95, "works" is granted as an exception to section 92(10). Instead of the general parliament being granted an enumerated exclusive right (ie, in Section 91) over works of "general" or "national" advantage, all works are granted to provincial governments with occasional exceptions to be made for the General Government. So despite the fact that most commentators on the BNA Act have identified the declaratory power of the federal government as an immense one, its placement as an exception to a local power instead of an enumerated power of its own illustrated its intended minimal use.

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[249] Lord Carnarvon, *Debates*, 565

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[250] In Canada's present day constitution we find an analogous practice with section 94A of the *Constitution Act, 1867*. Under section 94A the federal government is granted the right to legislate on old age pensions, but with provincial paramountcy. The result has been a national pension scheme, despite provincial paramountcy with the exception of a separate national (provincial) pension scheme for Quebec.

[251] Lord Carnarvon, *Debates*, 565

V

As mentioned earlier, Lord Carnarvon reinforces the importance of the CLVA and the nature of its application to the new Confederation settlement – although he does not explicitly refer to the CLVA (merely stating that the BNA Act was to be "in conformity with all recent colonial legislation"[253]). However, this point is repeatedly made in the speech[254] and the effective constitutional superiority (although not superordination) of the provinces is confirmed. The Dominion government is a

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[252] A more modern and what would appear to be a less precise example would be an exclusively intra-provincial airport. A first glance such a work would appear to be solely 'local' since it was located wholly within a province serviced only to airports within the province. However, it could legitimately be decided to be part of a 'national' network of airports if it connected with an airport that had inter-provincial or international flights.

[253] Lord Carnarvon, *Debates*, 564

[254] For example, see also *ibid* 564 and 562

"permanent enactment"[255] between the provinces and can thus only be altered with their unanimous consent, whereas the provinces continue to maintain the right to autonomously alter their own constitutions.

The phrase "high functions and almost sovereign powers" is not a grant of overwhelming power or even "sovereignty" to the General Government extracted from local legislatures. Instead it is a grant of limited "high functions" that were previously not *effectively* legislated upon by provincial governments, or handled by Imperial legislation. These "high functions" of state would include such things as a "common system of weights and measures… postal arrangements… [and] currencies" For example, of on the "high functions and almost sovereign power" of a government is control and management of currency. This is a "high function" because of its importance in regulating commerce, but it is an "almost sovereign power" because of the right to coin currency which contains the figure of the sovereign. What has been overlooked by those few previous commentators on Lord Carnarvon's speech was that he gave extensive examples of what he envisioned would be in practice the powers which the new Dominion government would exercise and effectively gave a vision of the new union in this description – and what he described were hardly sweeping powers.

VI

One can divide Lord Carnarvon's speech into thirteen sections.[256] In the penultimate section he reviews four, or possibly five, "advantages which may be reasonably anticipated."[257] The first of these anticipated advantages is an emphasis on local control over spending and local raising of revenues:

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[255] Lord Carnarvon, *Debates*, 562

> *Local taxation and expenditure will depend upon local authorities. ... All local works will devolve upon local authorities who in turn will be responsible to the taxpayers.*[258]

This anticipated advantage was likely aimed at reconciling one of the major complaints of Canada West in the old Province of Canada, where Canada West felt that revenue was disproportionately being raised in Canada West but was being spent in Canada East. Lord Carnarvon argues that in the future Confederation this ill would be removed, for there would be a greater degree of local (provincial) responsibility and control over local revenues and spending. Lord Carnarvon even realised that it was possible:

> *that [the] Parliament [of the United Kingdom] undertakes a wider control in England than is contemplated by this Bill in the confederated Provinces, I reply first, that there is a difference in the management of local affairs by a central body between a country which contains 100,000 square miles and one which now contains 400,000, and may one day contain 3,400,000 square miles and, secondly, that the lesson which the English Parliament affords us in this matter is a lesson rather of warning than of encouragement.*[259]

This illustrates, when discussing the advantages of union, that Lord Carnarvon well understood that the union he was proposing was not to be a highly centralized one, but one which both "morally" and "practically"[260] (or of "faith and political expediency"[261]) emphasised the importance of local control.

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[256] See table 1
[257] *ibid* 573
[258] *ibid* 573
[259] *ibid* 573-74
[260] *ibid* 576
[261] *ibid* 563

The second advantage outlined by Lord Carnarvon was the "uniformity of banking," a "common system of weights and measures," an "identity of postal arrangements" and common "currencies." Although the exercise of these powers were clearly "high functions" and "almost sovereign powers" they are hardly matters of intensive control, especially in an era that stressed the ethic of free trade. For even those who wished for protectionist tariffs, few would be willing to deny uniformity in communications and measures. In the present-day world, where the ethic of free trade similarly dominates (but in fact not as invasively as in the mid-Victorian Empire), few are willing to deny the logic of international uniform measurements, communication standards, rules governing financial transactions, and common and stable exchange rates, if not outright common currencies. Lord Carnarvon's words arguing for British North American Union could just as easily be spoken by a present-day statesman promoting international institutions:

> *I can hardly understand that any one should seriously dispute the advantage of consolidating these different resources, and interest, and incidents... under one common and manageable system.*[262]

The third "advantage to be gained from that union"[263] outlined by Lord Carnarvon, was the "question of military defence."[264] This issue, if pre-Confederation correspondences are any indication, was the most pressing to the Colonial Office. As the pre-Confederation correspondence indicates, the Colonial Office would be happy with any arrangement that allowed for effective concerted action on this issue, and its absence would kill any arrangement in their eyes.

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[262] *ibid* 575
[263] *ibid* 575
[264] *ibid* 575

The fourth "anticipated advantage" of union outlined by Lord Carnarvon was a "moral and political aspect,"[265] of an improved quality of parliamentary life that can emerge from a large political body. It is this "anticipated advantage" that appears as the most centralizing aspect, not because it would directly augment the powers of the General Government, but because it would raise its stature. It was hoped that this new legislature would draw the best statesmen from across the new Dominion and it was this element that was perhaps the most detrimental to the autonomy of the Provinces. Yet this was a choice to be made be the provinces instead of one imposed upon them by either the General or Home Government.

A fifth potential advantage is mentioned under the discussion of local control over local expenditures and that is of the central government's responsibility to develop the Northwest – "the valley of Saskatchewan up to the roots of the rocky mountains"[266] – if it is annexed to the union. However, although such a task would undoubtedly raise the stature and powers of the central legislature, it would not likely act to diminish the power of the pre-existing provinces.

These "anticipated advantages" that Lord Carnarvon outlines are hardly ones that one would be ascribed to a highly centralized union. All Lord Carnarvon seems to anticipate is a system of common defence, common banking, common communications, and a common currency; the term "Confederation" in its present-day meaning seems to be an appropriate title for the union described. The first of these "anticipated advantages" is actually a reinforcement of local power and local control. Further, the third "anticipated advantage originally outlined by Lord Carnarvon – a common military establishment – would be considered a significant centralizing feature if it was not for the fact that the system of common defence was not to be under the control of Canadian ministers, but under the Governor-General acting as an Imperial Officer at best. Section 15 of the BNA Act invests the Queen as the Commander-in-Chief of "all Naval and military Forces, of and in Canada," not the Governor General-in-Council. It was possible (and even likely) that the military (including the militia) in British North America would under the control of separately appointed Captain-General for military (land) forces, as was the case with the Naval forces, who served under a separately appointed Vice-Admiral for many decades to come. Therefore, Lord Carnarvon only anticipated that Confederation would bring to the central government independent power over a system of common banking, measures, communications, and currency; along with a common Parliament in which potentially newly arising "common" issues could be debated and legislated upon. Exercising control over matters handled by existing developed provinces is not present in this outline of "anticipated advantages."

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[265] *ibid* 576
[266] *ibid* 574

A general theme of the BNA Act and Lord Carnarvon's speech is one of "responsibility." Union should be brought about as an effective means for the British North American colonies to pay for their own defence instead of irresponsibly relying on British arms. There also was an emphasis on efficient and careful government spending. Confederation would bring a significant reduction in the cost of public debt. By consolidating the debts and assets as well as certain potential revenue sources of the several provinces into a single body, Canada could access cheaper bonds on the London money market:

> *By this agreement, the public creditor who exchanges the security of each separate Province for the joint security of the four Provinces confederated, will find his position improved rather than deteriorated.*[267]

However, this consolidation of assets and sources of revenue was not envisioned as crippling the fiscal autonomy of the provinces.[268]

What these "anticipated advantages" seem to reflect is that the creation of the new union was not seen as a zero-sum formula to Lord Carnarvon in regards to provincial and federal powers. Assigning power and prestige to the Dominion government did not translate into a reduction of power or stature for the provincial governments. The provinces would largely continue to exercise most of their pre-Confederation autonomy with the new Dominion government simply taking up those tasks the provinces were unable to exercise or could not exercise effectively.

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[267] Lord Carnarvon, *Debates*, 566

[268] Although tariff revenues made up the vast majority of the various colonial governments' revenues, the seminal work on government revenues and expenditures at Confederation, Donald Creighton's *British North America at Confederation* (Ottawa: J.O. Patenaude, I.S.O., 1939), does not address the issue of taxes levied and spent by local ratepayers for education and such local improvements. It is possible that sources of public revenue that came from tariffs and other indirect taxes has been over-emphasized, given that this local public spending may never have made it into the colonial bluebooks (and in the case of Lower Canada many of these services were paid out of tithes to the Catholic Church). Further, although indirect taxes (ie custom duties and excise taxes) were an important source of revenue for governments at the time, this was possibly less the case in the federating Provinces (and settler colonies in general), than in Britain or other advanced states as the would have less industrialized and thus more subsistence-based economies and would have engaged in less inter-jurisdictional trade. This is especially illustrated with Lower Canada, where one of the great complaints raised by Canada West during the Union period was that they carried the much greater fiscal burden of union because they purchased imports to a much larger degree and thus paid the greatest portion of tariffs.

Chapter 7

Canada Reorganized: *The British North America Act, 1867*

I now turn to the BNA Act itself. To present an interpretation of that Act, with the conceptions of Imperial Sovereignty, based upon a deeper examination of the colonial resolutions, under statutes of colonial governance, against the backdrop presented by the person who presented the Bill before the Imperial Parliament. First, the preamble:

> *Whereas the **Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united** into One Dominion **under the Crown** of the United Kingdom of Great Britain and Ireland, **with a Constitution similar in Principle to that of the United Kingdom***

This first portion of the preamble recognizes the pre-existing "provinces" (colonies)[269] and their autonomous and legitimate right to petition the Imperial Parliament, while conceding that sovereignty nonetheless rests with that Imperial Parliament as the provinces are limited to "express[ing] their desire" instead of agreeing amongst themselves (as in the preamble to the CAC Act). Further, the union is to be grounded upon a "federal" principle, but with a system of government whose machinery is similar to the United Kingdom. The clarification of "a Constitution similar in principle…" is a very pregnant phrase that conveys numerous meanings. It acts to illustrate that the new system is not American in nature (which the term "federal" would have indicated to many at the time) and that the relations between governments would, in principle, reflect intergovernmental relationships within the

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[269] The term "provinces" had been the historically used term to refer to the British North American colonies.

British Empire. As well, it means that the new Dominion is adopting the whole plethora of the British Constitution; not merely those conventions and rules which pertain to parliamentary practices and institutions of government, but those wider British traditions of respect of rights, including the respect of pre-existing institutions.

> *Such a Union would conduce to the* ***Welfare of the Provinces*** *and* ***promote the Interests of the British Empire****:*

This second portion of the preamble indicates, as in the first portion, that there are two 'parents' or interested parties: the federating provinces/colonies and the imperial government. The preamble does *not* declare a new British North American nationality, merely a system of governance among the provinces for the benefit of the provinces and the Imperial government.

> *[For] the Establishment of the Union* ***by Authority of Parliament*** *it is expedient, not only that the Constitution of the Legislative Authority in the Dominion be provided for,* ***but also that the Nature of the Executive Government therein be declared****:*

This third portion clearly lays out and reinforces overall Imperial Supremacy within the new system. This phrasing "but also" indicates that something significantly different is envisioned for the new Dominion with provision for the exercise of executive power significantly different from previous constitutional documents.

II

The first seven sections of the Act are additions that were not directly in the Quebec and London Resolutions, but in general are merely 'administrative' sections, necessary to the construction of a proper Act of Parliament. However, within these sections, section 5 could be cited as evidence of the provinces merely being "children" of the new Dominion government as it reads:

> *5. Canada shall be divided into Four Provinces, named Ontario, Quebec, Nova Scotia, and New Brunswick.*

However, such an interpretation is only the case in examining the section alone, not when taken in context of sections 4 and 6. Section 4 deals with the potential confusion in nomenclature only between the United Province of Canada and the new Dominion of Canada. Section 5 in light of section 4 merely becomes definitional of names as opposed to defining the nature of the Union. Whereas "Canada" once meant Upper and Lower Canada, "Canada" was now to include those old provinces (thereafter renamed) as well as Nova Scotia, New Brunswick and any province which would later be admitted. As well, section 6 reinforces this by stating that the old term "Canada" is being discarded and that the new provinces of Ontario and Quebec are actually *reversions* to the old provinces of Upper and Lower Canada. This is reinforced in section 138, where the Provinces of Quebec and Ontario are granted the right to use their individual Great Seals from before the Union of 1840.

III

Sections 10 to 14 are additions not included in either the Quebec or London Resolutions, and begin to give flesh to the preambulatory phrase that the "Executive Government therein be declared" for the new Dominion. Here, section 12 lays out how the government is able to exercise its executive power and indicates that the BNA Act is merely another statute with all pre-existing legislation, whether imperial or provincial, continuing to be in effect. Further Lieutenant Governors are granted this power equally and extensively as the Governor-General. No inferiority as to the exercise of executive power is created or envisioned in this section. Further, although 'responsible government' is generally taken to be a purely "unwritten" constitutional convention, it is actually partially codified throughout the Act in its requirement that certain executive powers are exercised exclusively by the "Governor-in-Council," that is to say with the "advice and consent" of either the provincial Executive Council or the federal Privy Council.[270]

Section 12 is repeated verbatim in section 65, which simply re-iterates how the now severed provinces of Upper Canada and Lower Canada are to continue to have their laws enforced. Further, section 64 states that the pre-existing constitutions and executive power of the governments in Nova Scotia and New Brunswick would continue uninterrupted with only the specific limited modifications by the Act – essentially the powers they have delegated to the Dominion government. These sections, especially the repetition of section 12 in section 65, indicate that the provinces were envisioned as autonomous from, and pre-existing to, the new Dominion government. The BNA Act did not make "One Dominion" by amalgamating old colonies and then dividing up the new Dominion for administrative purposes (as one might read into section 4); that the provinces were autonomous contracting elements. Nova Scotia and New Brunswick were directly continuous, whereas Ontario and Quebec (Upper and Lower Canada) were effectively recreated in their pre-1840 status and *then* federated into the new Union. Section 65 was already provided for by section 12, thus it not only merely repeats it, but it does so after section 64, where Quebec and Ontario are being created and proclaimed as provinces separately from the creation of the Dominion government.

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[270] See Appendix C.

IV

The BNA Act is most often claimed to be merely "quasi-federal" because of the unlimited veto power of the Dominion government over *any* provincial legislation. However, in light of the construction of the Act, these powers can hardly be seen as intended to be extensively used. The federal veto power over the provinces is lumped in section 90, which states that as sections 53 to 57[271] apply to the constitution of the federal government, they will apply to the constitutions of the provincial governments. In this section, the powers of federal veto are specifically parallel to the powers of Imperial veto (powers which were not innovations or even new codifications, but appeared as early as the *Constitution Act 1791*).[272]

Even if this veto power over provincial legislation was intended to be administered exclusively by the Canadian Cabinet, it can hardly be imagined to be an oft-exercised power if Imperial exercise of the same power over the Dominion Parliament was the model. The constitutional practice of responsible government meant that veto powers were to be used only sparingly for Acts which were either clearly unconstitutional or severely impinged Ottawa's interests (the "national interest"); never was it a power to be commonly used. If responsible government was the central political accomplishment of the colonials, one would expect in principle that it would be equally applied to the provincial governments as it was applied to the general government. However, this is not merely a principle that could or should be followed, but a principle that was constitutionally entrenched. Nova Scotia and New Brunswick were to maintain their old constitutions upon entering Confederation, and Ontario and Quebec were granted constitutions parallel to the new federal constitution, so responsible government was thus guaranteed to the provinces. It is interesting that this proposal was made at the Quebec Conference by Dickey and Fisher and not accepted at that moment,[273] but that it was to be later incorporated in the BNA Act by the Colonial Office. Thus, if responsible government existed in the provinces the use of disallowance would have to mirror its use by the Imperial Government over the Dominion government.

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[271] These sections not only include the veto powers, Sections 55-57, but recommendation of money votes, Section 54, and appropriation being the exclusive power of a lower chamber, Section 53.

[272] Of note is that section 90 replaces the "Queen and… a Secretary of State" (ie the Queen-in-Council of her Imperial cabinet) with merely "the Governor General" and not the Governor-General-in-Council. Given how specifically the powers of the Governor-General were described to be exercised throughout the Act, *it is interesting that the otherwise careful draftsmen of the BNA Act replaced the Queen-in-Council with merely the Governor-General*, when most commentators have argued that it was the federal Cabinet that was to disallow provincial legislation. However, if you assume that the draftsmen of the BNA Act were consistent in their writing, and that those moments when the Governor-General is commanded to exercise his powers both without council and without the Great Seal of Canada that he is performing his role as an Imperial Officer (and not a representative of the Crown), then section 90 seems to be written that the Colonial Office did not intend the Governor-General to exercise the veto power only with the "advice and consent" of his Canadian cabinet, but somewhat independently as an Imperial Officer. See Appendix C.

Disallowance can be understood as actually reflecting a weak general government. The general government had to be assigned veto powers over the provinces' legislation because it may not have been able to withstand the provinces rather significant exercise of power. This reflects the relationship between the Imperial Parliament and the colonial legislatures as well. The century previous to Confederation was replete with examples of the Imperial Parliament attempting to legislate in what was deemed by the colonists the exclusive purview of the colonial legislatures, only to face open revolt. Since superior legislatures faced extreme difficulties legislating for colonies directly, they at least maintained the power to veto legislation which threatened their interests and their areas of jurisdiction.

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[273] Browne, *Documents,* 63

Provincial governments had the ability to pass legislation that could obstruct or harass other provinces with no legislative recourse for those other provinces to challenge such a law. It was federal disallowance that granted a power recourse: if legislation in one province, although jurisdictionally valid, significantly impinged on other provinces, the legislation could be disallowed by the federal government. However, it was not to be an arbitrary power because residents of the said provinces were likewise represented in the general government and thus had a voice in the use of the power of disallowance. As discussed further below, the *exclusive* right of the provincial legislatures to legislate on "Generally all Matters of a merely local or private Nature in the Province" can be seen as being so powerful that any legislation that did not specifically fall within the enumerated heads of section 91 would be taken up *exclusively* by provincial legislatures. Disallowance was a means to ensure that the federal government would be able to legislate on some residual matters.

V

Commentaries on the grant of the power of "peace, order, and good government" (POGG) to the federal government[274] have generally concluded that

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[274] For example, see Peter W. Hogg, *Constitutional law of Canada* 3rd ed. (Scarborough,: Carswell, 1992); Patrick Monahan, *Constitutional Law* 2nd ed. (Toronto: Irwin Law, 2002); William H. McConnell, *A Commentary on the British North America Act* (Toronto: Macmillan of Canada: Maclean-Hunter Press, 1977); Bayard William Reesor, *The Canadian Constitution in Historical Perspective: with a clause-by-clause analysis of the Constitution Acts and the Canada Act* (Scarborough, ON: Prentice-Hall Canada, 1992).

"taken literally" it appears to be an incredibly huge grant of legislative authority whose enumerated heads which follow are "merely illustrative" since the clause reads that the enumerated heads do "not... restrict the Generality" of the grant of POGG.[275] Further that the JCPC would later "narrow[ly] interpret" POGG, "construing it as strictly a residual power that came into operation only with respect to matters not falling within the enumerated sections in 91 or 92.[276] As well, these lines of argumentation generally contend that provincial powers were 'widely interpreted' by granting the power over property and civil rights in section 92(13) as "all-encompassing," being beyond what was intended as the strength of provincial powers.[277] However, such interpretations ignore a possible – and I would argue a more truly "literal" or "pure" – reading of the sections on the distribution of legislative power as well as not fully incorporating the context and intent of the distribution of legislative powers.

The interpretation that the enumerated heads were "merely illustrative" and that the so-called "literal" understanding of POGG was the intended one is often simply assumed without evidenced being presented of its existence in the text itself. Quotations from John A. Macdonald are thus often given as contextual support for this interpretation, but – as I have often pointed out in this paper – John A. Macdonald was merely one of many "Fathers," and one can just as easily find opposing quotations by John A. Macdonald's allies George-Etienne Cartier and Hector-Louis Langevin.

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[275] Monahan, *Constitutional Law*, 255.
[276] *ibid*, 255-6
[277] *ibid*, 256

In reading section 91 carefully one finds that the powers of the general government are severely restricted despite the phrasing of "peace, order, and good government" and "not so as to restrict the Generality." Although POGG is granted to the federal government, it is equally denied power over the "*exclusive*" powers of provincial legislatures. The Act is written so that each level of government is granted "exclusive" powers over specified ("enumerated") legislative heads with a grant of POGG to the general government. However, as it is usually argued, the granting of POGG and "generality" of legislation was *not* a grant of *exclusive* residuary power.

However, a truly "literal" understanding of the clause – that is a literal understanding based on reading the whole clause grammatically and the whole section of the Act – reveals strong limitations on the power of the federal legislature.[278] In making this analysis one should note the different marginal description of clause 91 and 92. The marginal description for section 91 reads "Legislative Authority of Parliament of Canada" whereas the marginal description of section 92 reads "Subjects of exclusive Provincial Legislation." Thus, the marginal note of section 92 explains that it is a simple description, the marginal note of section 91 explains that it is a compound description. Therefore one must note that section 91 is divided by a semi-colon, and thus split into two clauses:

1) *It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces;*

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[278] For another analysis which the following is indebted see Albert S. Abel, "The Neglected Logic of 91 and 92," *University of Toronto Law Journal* vol. 19 (1969) pp. 487-521.

> 2) *and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated;*

What one should interpret from this is that the list of enumerated heads is not merely a portion or an "illustrative" examination of POGG, but a distinct grant of legislative power. The "Legislative Authority of Parliament of Canada" is divided into the above two sections, the first is the grant of POGG and the second is a grant of those "Subjects of exclusive [Federal] Legislation," akin to section 92.

For the Act to be properly understood, it must be read with – especially – sections 91-95 taken together under the topic area of "Distribution of Legislative Powers." One must read the grant of POGG and "generality" especially in light of section 91(29), the closing portion of section 91, section 92(16), section 94, and section 95. The Act intended to cover (enumerate) *all* matters of legislation that could possibly be exercised by colonial legislatures.

Section 91 outlines exclusive federal powers ("exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated"), Section 92 outlines exclusive provincial powers, and sections 93, 94, 95 and 91(29)/92(10) outline varying concurrent powers. The grant of POGG was simply an "emergency power" which empowered the central legislature to "guard against those evils which must inevitably arise if any doubt were permitted to exist as both respective limits of Central and Local authority… *although large powers of legislation are intended to be vested in local bodies*."[279]

The conception of residuary power as it is applied in the modern world does not equally apply to Canadian Confederation. In strict theory, all residuary power – all sovereignty – was left to the Imperial Parliament. However, the BNA Act, in conformity with other Imperial legislation (most importantly the CLVA) left residuary power severally to the Imperial Parliament, the Canadian Parliament, and the Provincial Legislatures. Although the general government was granted the general power to legislate for the peace, order, and good government of the new dominion, the provincial governments were granted the *exclusive* right to legislate on "Generally all Matters of a merely local or private Nature in the Province." Since section 91 specifically denies the power of the general government to legislate by invoking POGG onto any head enumerated in section 92, any provincial law justified under section 92(16) which did not encroach on the enumerated heads in sections 91 or 95 would render any federal law on the same subject repugnant to the provincial law so justified. Thus, any law duly passed by a provincial legislature (which did not encroach on the enumerated heads in sections 91 or 95) would be paramount to a similar federal law.

This also explains why the federal declaratory power had to be written into section 92 instead of either section 91, or in section 95 with the other concurrent powers with federal paramountcy. The wording of "exclusive" jurisdiction was so powerful as to be sacrosanct and inviolable. To include anything in section 92 and elsewhere would have been contradictory under the Act. Thus in order to maintain consistency in the Act it was necessary that a specific exception be written into the exclusive powers of the provinces.

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[279] Cardwell to Monck, 3 December 1864, cited in G.P. Browne, *Documents*, 169. *Emphasis added.*

With the exception of the POGG clause, the distribution of Legislative powers for the new system of government under the BNA Act is actually structured as follows:

1) Exclusive Legislative Authority of the Dominion Legislature, section 91. In this section the exclusive authority of the Federal government is granted and described: "the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated"
2) Exclusive Legislative Authority of the Provincial Legislatures, section 92. In this section the exclusive authority of the Provincial governments are granted and described: "in each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated"
3) Exception to the above rules A (re: education), section 93. In this section the "exclusive" authority of the provinces to legislate on education is excepted by a prohibition on infringing upon the rights of "Separate or Dissentient Schools" (as they existed in law at union) and a grant to the federal government of the power to "make remedial Laws" if this right is abrogated by provincial governments

4) Exception to the above rules B (re: property and civil rights), section 94. In this section the "exclusive" authority of the provinces to legislate on property and civil rights is excepted by the allowance for the federal government to legislate on property and civil rights, but that such legislation would only have effect if explicitly ratified by the provincial legislatures. Further, this exception could not be applied to the Province of Quebec (admittedly with its civil code) even if it wanted it to – Quebec's Civil Law was effectively protected for all time under the terms of the Act.
5) Exception to the above rules C (re: immigration and agriculture), section 95. In this section a subject of legislation is granted concurrently, without exclusivity, to both levels of government. As outlined by Lord Carnarvon, these powers are actually to be generally exercised by the provinces, but that because Canada was a "young country" there could very likely be numerous circumstances where the federal government may need to interfere in these areas.

Although commencing the section on legislative distribution, POGG should be seen as truly residual, that is a narrow, grant of power to be invoked only when one has done an exhaustive search of the largely exhaustive list of powers.

Interpreting POGG as a wide grant of power is contrary to the structure of the Act in General. The Act (as opposed to narrowly looking at only sections 91 and 92) is so written as to grant first exclusive federal jurisdiction, then exclusive provincial jurisdiction, and then a series of exceptions to exclusive provincial jurisdiction. Since the enumeration of powers was a novel development in British colonial history, as heretofore the powers of colonial legislatures were generally not enumerated, the nature of the appearance of POGG in section 91 is merely fulfilling what can be perceived as a simply lingering role. The essence of the "distribution of legislative powers" in the BNA Act is just that, their distribution. POGG is simply stating that legislatures may legislate, but that such legislation is subject to numerous restrictions. Before a colonial federal system these restrictions were simple: Westminster was wholly sovereign, but since under responsible government it largely restrained from widely exercising this sovereignty in colonies; colonies were therefore granted the residue of PWGG, which was therefore a considerable grant. The employment of the term POGG in the BNA Act implies that Westminster remains wholly sovereign and that its legislation not merely supercedes any and all colonial legislation; but that Imperial Legislation supercedes any and all divisions of legislative authority hereafter described. However, since the grant of legislative powers described in the Act is considerably exhaustive, the "residue of legislation," as Lord Carnarvon described, granted by POGG is severely limited, "if any."

Thus, the distribution of legislative authority is written to conform to a "last-in/first-out" or "first-in/last-out" principle where in order to avoid confusion, one reads through all the possibilities and then assigns its location. Thus, if in its primary pith and substance an exercise of legislative power is agriculture/immigration (section 95) it should be placed in that category, followed by legislation purporting to make the "laws relative to property and civil rights" uniform (section 94), by remedial legislation for education (section 93), by exclusive provincial powers (section 92), by exclusive federal powers (section 91), and then finally by POGG. This point is illustrated with section 93 on remedial legislation for education. It could not be included in the enumerated heads of section 91 because that would have made the power inferior to exclusive provincial legislative authority, whereas it is clearly intended to be superior, albeit exceptional. The concurrent power, with federal paramountcy, over "works" is included as part of an enumerated portion in section 92 partially because its appearance in section 91 would have rendered it inferior to provincial legislative powers, yet it does not appear in section 95 because – as Lord Carnarvon outlined – it was intended to be an ordinary exercise of concurrent *and parallel* power, whereas the federal legislative authority over agriculture and immigration was seen as being exceptional, but concurrent and overlapping.

This comprehension of interpretation of the distribution of legislative authority is reinforced by an examination of the drafts of the BNA Act composed by the Colonial Office. As mentioned before,[280] the first draft created by the Colonial Office was consciously and evidently highly centralizing.[281] In this draft the clause defining exclusive provincial powers, section 37 (the equivalent to section 92), appeared immediately before the clause defining exclusive general powers, section 38 (the equivalent to section 91), with the section on remedial legislation for education, and the section for the rendering uniform of law regarding property and civil rights appearing immediately afterwards – sections 39 and 40 (equivalents to 93 and 94) – just as in the final BNA Act.[282] The argument that the positioning of the enumeration of exclusive federal powers before the enumeration of exclusive provincial powers as an indication of the superiority of federal authority is significantly undermined by an examination of this earlier draft. As this draft is vastly more centralizing then the BNA Act, but is constructed in an identical manner; this earlier draft seems to indicate that the placing of provincial powers in succession of general powers is actually an example of their superiority.

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[280] See *supra* Chapter 3, section III, p. 76.
[281] Pope (ed.), *Confederation*, 141-157.
[282] Pope, *Confederation*, 150-155.

Although the legal notion of federal paramountcy is very much a part of our constitution, its existence is purely due to its adoption by the courts. Indeed, Peter Hogg mentions in a footnote in his seminal work *Constitutional Law of Canada*, "The Constitution Act, 1867 is curiously silent on the point [of paramountcy]."[283] However, I argue that the BNA Act is *not* silent on the issue, but actually grants provincial paramountcy to most 'residual' legislation, while retaining federal paramountcy on enumerated items. Obviously, federal paramountcy is granted to the federal parliament in the matter of agriculture and immigration specifically in section 95, (as mentioned above) it is granted paramountcy over "public works" through sections 91(29)/92(10), and it is granted 'paramountcy' in its ability to pass "remedial" legislation over minority education rights. However, this is the limit of the federal government's paramountcy as granted by the BNA Act. In general the powers enumerated in sections 91 and 92 were meant to be "exclusive" and not raise the question of paramountcy, because concurrency in most areas of legislative competence was not envisioned. However, as Peter Hogg states "conflict between a statute of the federal Parliament and a statute of a provincial Legislature is bound to occur from time to time because federal and provincial laws are applicable in the same territory, and by virtue of the double aspect and pith and substance (incidental effect) doctrines may be applicable to the same facts."[284]

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[283] Hogg, *Constitutional Law*, 418.

Generally one could argue that the power of POGG grants federal paramountcy, but section 91 reads that the federal government has the power "to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters *not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces*." Therefore the power of POGG is specifically denied in its application to the enumerated heads in section 92. However, since the province is granted the *exclusive* right to legislate on "Generally all Matters of a merely local or private Nature in the Province," any provincial law that does not specifically fall into either the enumerated heads of 91 or 95, should render any federal law, so far as it is repugnant to a provincial law, void since the provinces are granted *exclusive* authority to legislate *generally*. Therefore provincial residual laws are granted paramountcy. Section 91 grants the federal government, with the power of POGG, the general right to legislate on any subject matter subject to the restrictions outlined in sections 92 to 95, but only with the *exclusive* right to legislative over the enumerated matters. Whereas, Section 92(16) grants the provincial legislatures with the *exclusive* power of "Generally all Matters of a merely local or private Nature in the Province" the right to legislate on any subject matter, subject to the restrictions outlined in sections 91 and 93 to 95.

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[284] *ibid*

Further, section 91 confirms this provincial paramountcy by its closing paragraph (deeming paragraph). If paramountcy was to be granted to federal law why would the closing paragraph of section 91 be included?

> *And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.*

McConnell, in his *Commentary on the British North America Act*, argues that "Dominion paramountcy [is] indicated by [these] concluding words."[285] However, his conclusion is not justified. Federal paramountcy is indicated only so far as "any Matter coming within any of the Classes of Subjects enumerated in [Section 91]," not any act of the Parliament of Canada. This section guarantees only that any Act of Parliament whose pith and substance falls under the enumerated heads of section 91 will have paramountcy. This could still be a significant power of paramountcy save for the fact that the enumerated heads of section 91 and 92 were written so that there cannot be an easy invasion for the federal government. Take, for example, the key area of patronage appointments. The federal government is simply given the exclusive power to 'fix and provide' the salaries of officers of the government of Canada, whereas the provinces are granted the exclusive power to 'establish,' 'appoint,' 'determine the tenure,' and pay provincial officers. Whereas the provinces are granted the exclusive right to establish provincial officers, the federal government is not granted the same "exclusive" right. This is not to say that the Government of Canada was not expected to appoint federal officers, but that it was not granted an exclusive and paramount ability to do so. The federal government was denied the ability to invade local jurisdiction via administrative competence by creating federal officers who would fill administrative roles that was intended to be covered by provincial legislation.

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[285] McConnell, *Commentary*, 243.

Section 92(16) cannot be viewed simply as a provincial counterpart to POGG, as has been argued,[286] given how the statute is constructed. Elsewhere in the statute, provincial equivalents are made directly as with section 72-79 to sections 22-26, or section 90 to sections 53-57, or section 65-66 to sections 12-13. If section 92(16) was envisioned as a counterpart to a federal power to a federal power and one would have expected the appearance of a section 91(30), reading "Generally all matters of a general or public nature" or what appeared in the Quebec Resolutions:

> *Resolution 29(37). And generally respecting all matters of a general character, not specially and exclusively reserved for the Local Governments and Legislatures.*

Instead the final legislative head in section 91 reads:

> *Section 91(29). Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.*

This phrasing is even more significant when understood in the light of being the federal counterpart to section 92(16). Whereas the provinces are granted the open-ended power of being able to legislate for "Generally all Matters of a merely local or private Nature," the federal government is merely enabled to legislate beyond its enumerated heads in those areas "*expressly excepted*" in section 92. The failure to include the parallel resolution (what was Quebec Resolution 29(37) or London

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[286] Reesor, *Canadian Constitution in Historical Perspective*, 241.

Resolution 28(36)) in the BNA Act as a matter of law should have lodged a significant residual power with the Provinces over the Dominion Government. Whereas the provincial legislatures were granted the exclusive and superior legislative 'residual' clause, the General Government was only given the resultantly negligible phrase of "Peace, Order, and Good Government" in which to exercise residual legislative authority.[287]

"Property and civil rights" was clearly envisioned as a key legislative authority for protecting provincial autonomy, given the construction of section 94. This may seem a strange claim, given that section 94 is the mechanism by which the legislative authority over "property and civil rights" could be alienated from the provinces to the federal government. However, what is key to note is that this clause *specifically* excluded the province of Quebec. Thus, not only was the federal government barred from interfering in property and civil rights "unless and until it is adopted and enacted as Law by the" provinces, but the Province of Quebec was utterly barred under the terms of the BNA Act from doing so, even if it enacted a law adopting federal interference in "property and civil rights." The separate civil code of Quebec was thus seen as being central to maintaining the autonomy of that province such that they could not even *willingly* change that provision under the terms of the BNA Act. The 1760 *Articles of Capitulation* which guaranteed the use of French customary law in Lower Canada was perpetually enacted in the BNA Act, even if the legislature thereof wanted it to change.

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[287] See Appendix D

Further, the power of "property and civil rights" as a key legislative authority was clearly recognized in the weeks leading to the final draft of the BNA Act. Cartier and Langevin resisted attempts by the Colonial Office and other delegates to remove provincial legislative jurisdiction over "property and civil rights" in exchange for other explicit recognition and protection of French-Canadian culture and institutions[288] (including, I assume, the perpetual maintenance of the civil code, simply to be altered by the central legislature – as Scotland's separate civil code is protected and amended by Westminster[289]). The removal of "property and civil rights" was attempted and fiercely resisted simply because both sides of that conflict realized that this power was going to be key for autonomous provinces, and those who desired a more centralized union wanted it out, and those who wanted greater provincial autonomy wanted it to remain.

Again, the deeming clause of section 91 reads:

> *And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a* local or private Nature *comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.*

What this clause says is that section 92(16), as the *exclusive* legislative jurisdiction of provinces, cannot be used to override the enumerated heads. However the corollary of this is that the enumerated heads of section 92 take precedence over the enumerated heads of section 91 (as per the JCPC's later much criticized interpretations of the Act). Therefore section 91 is stating that the federal government has control of "classes of matters" enumerated in section 91, subject to (inferior to) the provinces' ability to legislative authority over those "classes of matters" enumerated in section 92. The Colonial Office – likely realizing the strength of the proposed "property and civil rights" clause – produced drafts of the BNA Act which included the same deeming clause as in the current section 91, but replaced "local or private nature" (ie s. 92(16)) with "property and civil rights" (ie s. 92(13)).[290] These drafts, however, were rejected.

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[288] Saywell, "Backstage," 334-335

[289] *ibid*

It is also widely argued that not only was the Dominion government granted the sweeping power of POGG, but that even its enumerated heads of power "for greater clarity" illustrated that it was granted "all the great subjects of legislation"[291] and intended to be dominant. This claim does not stand up to scrutiny for a colonial society.

Section 92(5) "The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon"

This section should immediately jump out to any student of nineteenth century British Imperial history. This was an immense grant of power to be invested with the local bodies. For control and management of colonial lands had been a *major* point of contention between settler colonial governments and London. The grant of this power to the colonial government was a hard-sought power that London did not easily part with. Its granting to the local legislatures would only be a massive and bizarre fit of absentmindedness if a highly centralized union was envisioned. Control of lands was perhaps the single greatest concession made by the Imperial government other than responsible government. Thus, whatever level of government in a colonial federation was granted this power can be seen as a declaration of which tier of government was to by the more powerful in a colonial federation in the1860s.

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[290] Pope (ed), *Confederation*, 234

[291] John A. Macdonald from Canada. Parliament. *Parliamentary debates on the subject of the confederation of the British North American provinces*, 3rd session, 8th Provincial Parliament of Canada. Printed by order of the Legislature (Quebec: Hunter, Rose, Parliamentary Printers, 1865), 33.

The second key power of colonial life was patronage. A large portion of the struggle for responsible government was the fight for local and representative control over lucrative patronage appointments. In examining section 91 and 92 there seems to be a much broader field for patronage appointments at the local level. The provinces are empowered to grant licenses, the "Establishment, Maintenance, and Management" of every sort of institution from prisons to Hospital to charities. What is most telling in this regard is section 92(4)

> *Section 92(4). The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.*

The equivalent federal power however is phrased in a much more limited fashion:

> *Section 91(8). The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.*

This federal equivalent lacks the important phrasing of 'establishment, tenure, and appointment' to be replaced solely with "fixing and providing." This much more limited grant indicates that the general government was not envisioned as a locus for the creation of a plethora of government officers and thus patronage.

Thirdly the provinces were granted section 92(13): "Property and Civil Rights in the Province." I will not dwell on this grant of legislative power, for its use since Confederation has illustrated what a significant grant of power it was. Admittedly, such an *ex post facto* argument is flimsy save for the fact that the power of this section was originally envisioned in 1867. In the discussions between Colonial Office officials and the Lower Canadian delegates to the London conference, there were many efforts to remove this power from the provinces as a method of greater centralization, but they were fiercely resisted and the Colonial Office conceded the power to the provinces.[292] However the fear of this power was evident in various drafts of the BNA Act where the equivalent to the concluding paragraph of section 91:

> *And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the* Class of Matters of a local or private Nature *comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.*

Instead in the drafts it read:

> *And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the* Subject of Property and Civil Rights *comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.*[293]

Further, the powers granted to the general government were not necessarily a diminution of provincial powers. Although as Lord Carnarvon stated that Confederation was based upon "the surrender of certain powers, rights, and pretensions by the several Provinces into the hands of the central authority,"[294] most of the powers granted to the general government are either not as strong as they are portrayed or were simply not previously exercised by the colonial governments and contemporarily were likely to be largely legislated on by the imperial government for the foreseeable future.

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[292] Saywell, "Backstage," 334.
[293] Pope (ed.), *Confederation*, 154 and 234.
[294] Lord Carvanon, *Debates*, 576.

On the supposed federal "great subjects of legislation," claimed by John A. Macdonald, we find in the first category is the lauded power over "trade and commence," which is usually compared to its American equivalent and thus cited as being intended as a major source of federal power. As Frederick Vaughan has recently argued, "no decision of the [Quebec] conference indicated more plainly the intention of the delegates to form a strong central government than the section of [Quebec] resolution 29 providing for federal regulation of trade and commerce."[295] However, federal power over trade and commerce was originally – and since Confederation became very significantly – tempered by the provincial power over property and civil rights.[296] The intended strength of this power must be understood in the context of the Victorian British Empire, which since 1846 was committed to universal global free-trade.

Did the British pursuit of universal free trade following the repeal of the Corn Laws in 1846 indicate a desire to merge the whole world into one super-state? The question is ridiculous. Free trade was believed to bring nations closer together, to live more peaceably, but it was not meant to absorb the rest of the world into the British state, as well as it was viewed exclusively as a carrot and not a stick in this endeavour for peace. As stated, the movement towards free trade inspired a derivative movement of "little England"-ism – a desire to shed wider political (generally

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[295] Vaughan, *Canadian Federalist Experiment*, 61.
[296] With the JCPC rulings in *Hodge* (1883), *Parsons* (1880), and *Maritime Bank* (1892).

Imperial) connections for a more local (and thought to be cheaper) focus. Free trade was believed to be the economic equivalent to liberty; adhesion to its principles may bring nations more closely together, but only by logical and rational benefit, not by over-riding or imposed authority. Power over trade and commerce would only weld the provinces together by their mutual belief in its rational benefits, not through mere authority. The Colonial Office, as further expressed by Lord Carnarvon in his address the House of Lords,[297] and the internationally commercially minded Maritimes believed commerce should be regulated as little as possible. For the Maritimes and the Colonial Office the grant of power over trade and commerce was perhaps hoped to be only a limitedly exercised power.

The second area of federal powers was powers that were haphazardly legislated on by both London and the provinces. Powers over maritime issues (heads 9 to 13), patents and copyrights (heads 22 and 23), and relations with internal aliens – including Aboriginals – (heads 24 and 25) had previously been dealt with concurrently through imperial and colonial legislation, with London being the primary legislator. Currency, for example went largely unregulated in many of the colonies with Spanish, French, and Mexican coins commonly circulating along with the Pound Sterling and American Dollars, with exchange rates fluctuating rapidly among the various colonies.[298] Aboriginal treaties had always been the purview of resident Imperial Officers because Aboriginal relations were treated as a special relationship with the Crown. Maritime issues had been – and continued to be –

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[297] Lord Carvanon, *Debates*, 569-570.

[298] Christopher Moore, *1867: How the Fathers Made a Deal* (Toronto: McClelland & Stewart, 1997),

heavily regulated by Imperial statutes and the federal government's ability to legislate on the matter would continue to remain significantly limited by section 2 of the CLVA.

As argued earlier, many of the significant powers granted to the general Parliament involved less of a combining former colonial powers into a single body than it was a way for Britain and the Colonial Office to make North American colonial administration easier and cheaper.

VI

The inferiority of the provinces to the general government is often argued upon the basis of the subordination of the Lieutenant Governors to the Governor-General and inability of the new Lieutenant Governors to exercise certain royal prerogative powers such as granting pardons (something initially envisioned in the Quebec Resolutions – resolution 44). The inability to grant pardons was a reflection of the Crown's unwillingness to grant such powers to persons not directly appointed by the sovereign.[299] The BNA Act provides for Governors-General or Lieutenant Governors to appoint Officers in their stead (s. 14 and s. 67); however such officers would be equally unable to exercise such powers. As well, section 72 of the BNA Act specifically grants that "the Lieutenant Governor *in the Queen's Name*" shall appoint members to the Legislative Council. This wording grants the Lieutenant Governor of Quebec status as a representative of the Crown in his own right, but simply appointed by another officer of the Crown.

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[299] Edward Cardwell, "Despatch from the Right Honourable Edward Cardwell, M.P., to Viscount Monck" (3 December, 1864), 447-448.

In pre-Confederation British North America, the Lieutenant Governors were nominally subordinate to the Governor-General and both Lieutenant Governors and Governors-General had their "Salaries and Allowances" "fixed and provid[ed]" by the colony itself.[300] With the advent of responsible government the positions of Lieutenant Governors in British North America lost some of their prestige and would no longer satisfy the ambitions of the British gentlemen sent to fill them. Generally, posts of Lieutenant Governor in British North America were not handsomely paid,[301] were generally isolated, and provided little opportunity to exercise actual power (the Governor of New Brunswick just prior to Confederations, Arthur Gordon, was quite delighted to be sent off to govern Hong Kong after Confederation since it gave him the opportunity to exercise real power[302]). This supposed subordination of the provinces reflects more of a desire of the Colonial Office for easier administration Britain's colonial holdings. The positions of Lieutenant Governor in British North America were less and less a prime appointment for ambitious nobles, and these numerous positions directly appointed by the Crown forced the Colonial Office to deal with a half dozen administrators who all felt amply justified in dealing directly with London due to their direct regal appointment. The granting of this power locally to Canada meant that communications between North America and Britain would be simplified and streamlined for the Colonial Office and that the new Dominion government would have some patronage appointments to dispense with.

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[300] See, for example, the *Act of Union, 1840* 3 & 4 Vict. c. 35 (UK). See also *infra* note at 280.

[301] Under the *Act of Union, 1840* 3 & 4 Vict. c. 35 (UK). the Governor-General of Canada was paid 7000 pounds, but only 1000 pounds for the Lieutenant Governor; further, this compared with 1500 pounds for a senior judge in the colony.

[302] Creighton, *Road to Confederation*,

Chapter 8

Conclusion

> *It appears to their Lordships... that the objection... raised by the appellants is founded on an entire misconception of the true character and position of the provincial legislatures. They are in no sense delegates of or acting under any mandate from the Imperial Parliament. When the British North America Act enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to the matters enumerated in sect. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by sect. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion.*[303]

Scholarship on the role played by the Judicial Committee of the Privy Council in interpreting the federal nature of Canada's 1867 constitutional settlement, although extremely contentious of its merits, is universal in its agreement that the Law Lords of the JCPC "significantly altered the terms concerning the division in powers of the original constitution... to weaken the powers of the federal parliament and to increase the powers of the provincial legislatures."[304] This common contention seems bizarre, as no explanation is given as to why the British Law Lords, who supposedly had no familiarity with federalism or the Canadian experience, would so consistently rule in a way that rendered the BNA Act a "classical" federal constitution against the supposedly evident intent of the Statute. The answer, however, is starkly laid out in the above passage from *Hodge* (1883) delivered by Sir Montague Smith. The Law Lords were reading the BNA Act not in a 'literal' twentieth century meaning, where all powers granted are expected to be entirely exercised – exercised to the limits of their "tether." Instead they ruled according to the constitutional structure they understood, what some of the "Fathers" understood, and what the Colonial Office understood.

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[303] *Hodge v. Regina* (1883) from Great Britain, Privy Council, Judicial Committee, *Decisions of the Judicial Committee of the Privy Council relating to the British North America Act, 1867, and the Canadian Constitution, 1867-1954* vol. I, Richard A. Olmsted (ed) (Ottawa: Information Canada, 1973), 198-199.

[304] Vaughan, 125-6

In the twentieth century critiques of this interpretation have the same problems as the appellants before the JCPC in 1883. Their understanding of the Canadian constitution "is founded on an entire misconception of the true character and position of the provincial legislatures." Colonial legislatures were granted "plenary and ample" power by the Imperial Parliament and were bodies that were "supreme and [have] the same authority as the Imperial Parliament" within "the limits prescribed by sect. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow" – "limits" which were not very restrictive and were as ample, or more so, than the federal powers.

For the Law Lords, the provincial legislatures were no mean bodies; their status was created by an Imperial statute and thus contained the same full plenitude and freedom of action as any other legislative assembly erected by Westminster in the empire. From 1840 to 1854, the Provincial Parliament of the Canadas was proscribed from altering the ratio of its members from Canada East and Canada West. This was a unique proscription in the Empire, but no one would argue that such a unique limitation made the legislature of the Province of Canada inferior to any other colonial legislature in the Empire. For the Law Lords, the statutory proscription on the legislature of the Province of Canada would not have reduced its "plenary" character. The proscriptions on the provincial legislatures in sections 91 to 95 were similar in nature to the above proscription; they limited the actions of the provincial legislatures under an Imperial statute, but did not alter their fundamental pre-Confederation character.

The Law Lords would have read the BNA Act and interpreted the powers of veto, the styling of a Lieutenant Governor, the full exercise of colonial legislative privileges (section 90) and traditions, and easily concluded that these were not bodies designed to be subservient to the federal legislature in their internal autonomy, but that only as any colony in the Empire's internal autonomy they were subject to the Imperial Parliament.

II

As Stéphane Dion has commented, Canadians have been practicing subsidiarity without even realising it.[305] This seems to be the theme which animated Britain's initial understanding of Confederation. The lowest level would continue to exercise the most powers, with superordinate levels of government practicing the ones which could not be exercised effectively by subordinate levels of government. This was the basis of the British Empire, where responsible government had been introduced and it was this that was largely the reason why the colonial office became so supportive of union among her colonies. The problem with colonial government in British North America was that there were certain powers that the Imperial centre was not willing to or interested in exercising, yet the individual colonies lacked the ability to effectively exercise such powers themselves (the key one being defence). For Britain a wider system of government was needed so that the colonies could become more self-reliant. In this perception, the colonies were not necessarily unable, but definitely unwilling to be self-reliant and thus a drain on Imperial resources. A union among the colonies was seen as a way to pool resources so that on key concerns the colonies could act self-reliantly and not be dependent on the Imperial government.

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[305] Stéphane Dion, "History and Prospects of the Canadian Social Union," *Straight Talk. Speeches and Writings on Canadian Unity* (Montreal: McGill-Queen's University Press, 1999), 69-71.

The calls by Lord Carnarvon for "one common system" and the seemingly expansive powers of the federal government were not automatic declarations of centralization, although they were calls for greater uniformity. Undoubtedly the British would have preferred the replacement of the various British North American colonies with a new single colony, but as such a task was impossible, the result was largely the status quo with centralization and common rule made for only those areas of key concern. However, this does not mean that the British government believed in immense diversity among her British North American possessions; there was clearly a desire for uniformity as it was thought that there was one common, ideal form of government that could exist and that uniformity would promote greater trade and progress. However, uniformity is not the same as centralization. The BNA Act is written so that a framework in which uniformity could be achieved, but only upon the willing adherence of the provinces themselves.

The British confidently believed in the innate superiority of their laws, customs, and institutions. This confident belief in such superiority meant that their laws did not need to be imposed, for others – if given the proper opportunity – would recognize how much better their system was and would willingly adopt it. British rule in North America had been long predicated upon this ideal. Governor Simcoe attempted to create Upper Canada as a model British colony that would illustrate to the wayward Americans that their republican system of government was deficient to the shining model to the north. Prime Minister Pitt, upon introducing the *Constitution Act, 1791*, argued that he was not imposing English laws on Lower Canadians because he believed the example of their good use in neighbouring Upper Canada would be enough of an incentive to convince them to adopt such system of laws.[306] British policy in Canada revolved around a supreme confidence in the superiority of their ways that others would willingly adopt if they had the mechanisms to do so.

The expansive powers of the federal government stem from the conception of sovereignty understood by the British. Their political system was built on a Hobbesian order that, in order to universally guarantee the sustainability of society, the government had to have the ability to intervene and legislate for society in an unfettered way when situations called for that. Yet one of Hobbes' overriding concerns was for liberty. He proposed his Leviathan as the only sure defence of liberty because he believed that whatever compromises a powerful authority would put on the rights of individuals, it was better than the breakdown of society where everyone's individual liberty was sacrificed to the anarchy of arbitrary and random violence. For Hobbes, to artificially limit the powers of government was to create a government that could break down and lead to that random violence. This did not mean that societies thus constructed should not pursue individual liberty. Hobbes was a critic of the ancient Greek *polis* because, although it provided for a strong, legitimate, and supreme government, these societies did not provide liberty. For Hobbes and the British political order, in usual times liberty and the limited exercise of government powers was the norm and ethic that should be followed leaving individuals and more local social groupings to decide their own fate. Federalism based upon limited government posed the significant threat of civil war as was contemporarily being vividly played out in the Great Republic.

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[306] William Pitt, House of Commons debate on the Quebec Act. Quoted from Vaughan, 33.

In Vaughan's criticism of the JCPC he argues that the Law Lords "appeared institutionally unwilling to ask: What conception of federalism does the Constitution Act, 1867 itself contain? Indeed they seem to never have done so."[307] However, the opposite of what Vaughan argues appears to be true. It is precisely because they *did* ask themselves what conception of federalism the BNA Act contains that they made the rulings that they did, and they answered that it was a system of "classical" federalism. As nearly every author has noted (and thus confused), in a 'literal' 20th century reading of the BNA Act, one is left with a mere "quasi-federal" system of government. However, I would surmise that the JCPC 'imposed' a system of a decentralized "classical" federalism because that is what they – rightly – believed was the common intent[308] of the original framers of the BNA Act. Thus the Law Lords were called upon to answer a question never called upon before: how do you reconcile theoretically unlimited government with federalism, which to that time – and since – had been founded upon systems of limited government.

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[307] Vaughan, 128.
[308] By "common intent" I mean that minimal intent of centralization that all the framers of the Act were willing to agree to.

Vaughan also criticizes the Law Lords for seeing "their function in cases arising under the Canadian constitution as essentially political, not judicial."[309] I would argue that Vaughan sees this interpretation because the nature of unlimited government and a "flexible" constitution means that any judicial constitutional ruling is going to have the appearance of being political. Theoretically, the Judicial Committee of the Privy Council is not a court; its members are merely Privy Councillors giving advice to the monarch. Yet, in practice it is purely a court and serves the function of a court of final appeal. The JCPC acts as a purely judicial body and its decisions are universally treated as binding as if they had been produced by a court. Even though the Monarch could *in theory* reject its advice, the Monarch never has rejected such advice nor would she do so. It is this logic, analogously applied to the BNA Act, which Vaughan and nearly every scholar before him have failed to fully comprehend. The 'literal,' theoretical powers granted under the BNA Act were never envisioned as being the practical exercise of those powers. To say that the framers of the BNA Act, and the intent of that Act, was to create a highly centralized federation – because that Statute contained, for example, the powers of disallowance – is akin to arguing that the framers expected the Queen to come across the Atlantic and to personally and independently exercise all executive power in Canada, because that is what the Act "literally" proclaims.

What the Law Lords were presented with was a situation where the federal government was violating the principles and intent of the BNA Act through its excessive use of either powers granted to it (such as disallowance) or powers the federal government decided to appropriate that were not properly given to it (such as the excessive use of POGG). The Law Lords understood that the intent of the BNA Act was to grant autonomy to the provinces while providing a system for the resolution of common issues. For the Law Lords, the actions of the federal government could be construed as not resolving common issues, but legislating upon local issues. In making their rulings, the Law Lords were upholding the sovereignty of Westminster by applying the intent embodied in one of its statutes. Their rulings were "judicial" and not "political:" the Law Lords were presented with two bodies that were both subordinate to the Imperial Parliament (as they were both created by Acts of that sovereign body) and rendered decisions regarding their conflict according to the intent of the supreme legislative or sovereign authority. To have rendered rulings that would have applied a strict 'literal' twentieth century comprehension to the BNA Act (which often ignores the colonial context) would have been "activist" and "political" because it would have changed the stated intent of sovereign Westminster.

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[309] Vaughan, 127

As the title of this essay states, the Colonial Office saw the creation of the Dominion of Canada, not as a creation of a new colony in its North American possessions, but a reorganization of the relationship among the existing colonies and with those existing colonies and the Imperial centre. Sovereignty remained lodged externally to these colonies, but autonomous rule was guaranteed. The form of autonomous rule was simply the application of the principle of the existing system of autonomous rule: responsible government. The principle of responsible government, which most scholars will eagerly report does not exist anywhere in the BNA Act, was the guiding constitutional principle of Canada's political order in 1867 (as it is largely today). The logic of this system granted internal autonomy to any legislative body duly granted those rights and powers of responsible government. Thus, just as the Imperial government was constitutionally prohibited from interfering in the local self-government of any colony, even if such colony's actions were seen as against the interests of the Imperial centre; so too were the rights of provinces exercising responsible government meant to be free from the interference of the federal government in its protected area of jurisdiction. The failure of Canada's federal government to respect the sovereign will of the Imperial Parliament by the federal government's abuse of the Constitution of Canada granted by Westminster, thus seems as likely a reason for the JCPC to rule as it did. In truth, *the Law Lords actually had extensive experience in dealing with the form of federalism that existed in Canada, for the system of federalism created for Canada simple mirrored that constitutional order of the wider empire*. It would have been domestic Canadian judges that would have lacked the experience of dealing with Canada's unique form of federalism in the first decades after Confederation, not the more experienced Law Lords of the Judicial Committee who effectively dealt with a federal empire.

The jurisprudence on POGG being limited in scope to a mere right of intervention in times of emergency is actually a sublime reflection of the intent behind Canada's 1867 constitutional settlement and the general meaning of that phrase. The Colonial Office believed that it had created an exhaustive division of powers under the heads of 91 to 95, with POGG included as an adherence to unlimited government, but one that was not to be commonly exercised. The "flexible" constitutional structure of the United Kingdom is an expression of "British pragmatism." Constitutions, written or otherwise, are guaranteed and run smoothly only so far as a population conventionally agree to adhere to them. The "unwritten" constitution of the United Kingdom has successfully persisted for as long as it has because of the population's attachment to the principles and "spirit" of that constitution, whereas there are an immense number of other constitutions around the globe which were carefully designed to protect civil liberties and democratic rights, yet became meaningless because the population as a whole did not adhere to the "spirit" of the written document. Canada's constitutional origins, which rested largely on a "flexible" constitution with "unwritten" conventions, require society's and politicians' adherence to the "spirit" of our constitution over its "black-letter" codifications for the continued sustainability and vibrancy of Canada's constitutional system. Restrictions on the power of the federal government are the result of its own failure to adhere to that order.

III

In *Constitutional Odyssey*, Peter Russell creates a bizarre juxtaposition. Russell first commences with a brief survey of the foundation of Canada's constitution, including the aforementioned 1733 celebrated observance of Henry Bolingbroke on the "unwritten" nature of the British Constitution. However, after describing this constitution, he then further goes on to state that this un-codified constitution is meaningless in the present-day world and only the "black-letter" codifications contain any meaning. For Russell, the Canadian constitution is illegitimate because he believes it continues to be based on Imperial sovereignty instead of Lockean popular sovereignty. Despite the fact that Canada's constitution has its origins and development akin to the observance of Henry Bolingbrooke, he believes that such a position is no longer applicable to the modern world. Thus the anti-democratic, against -popular sovereignty, strict text of the Constitution Acts is the fundamental construction of the Canadian constitution. However, Russell is only able to see the "façade" of Canada's constitutional structure and fails to realise that Canada and the UK have been reconstructed on the base of popular sovereignty, even though this does not appear directly in the text of the Constitution Acts. A 'revolution' occurred in the late nineteenth and early twentieth centuries, but this revolution that did not tear down the façade of the "British Constitution." The Third Reform Act of 1884, the wording of the preamble of CAC Act, 1900, the *Parliament Act, 1911*, and – of course – the *Statute of Westminster, 1931*, confirmed the sovereignty of the British people and the severally discrete popular sovereignty of Britain's colonies of settlement (the "White Dominions"). The *Statute of Westminster* is the key document in this conversion of Imperial Sovereignty to popular sovereignty. In this statute, the Imperial Parliament is renouncing its Imperial sovereignty over Canada. The precedents of the Parliament Act and the various Representation of the People Acts are implicit in this document. The Imperial Parliament is renouncing sovereignty over the Dominions because the principle of popular sovereignty has been embraced. The Imperial Parliament can no longer legislate for the Dominions because the people of the Dominions are sovereign and since they lack representation in the Imperial Parliament, the Imperial Parliament cannot legitimately legislate for them. (This was an underlying motivation for the late nineteenth and early twentieth century movement for Empire Federalism that hoped to equally represent the Dominions in the Imperial Parliament so it could legitimately legislate for them). Further, section 7 of the Statute of Westminster explicitly states that in this transfer of imperial sovereignty to popular sovereignty it is not transferred solely to the Canadian polity as a single unified political entity, but that sovereignty is transferred to both Canada as a polity and the provinces severally as polities:

> *Section 7(3). The powers conferred by this Act upon the Parliament of Canada or upon the legislatures of the Provinces shall be restricted to the enactment of laws in relation to matters within the competence of the Parliament of Canada or of any of the legislatures of the Provinces respectively.*

Thus the contest between sovereignties should not be, as Russell has defined it, as one between popular and 'imperial' sovereignty, for popular sovereignty long ago won out. A more legitimate contest is whether popular sovereignty lies with Canada as a whole, or with its respective provinces, or with its respective nations. Earlier in this paper I noted that the "Colonies were dynamic bodies which could define their own constitution, [but] the new Dominion was a 'permanent enactment' that came into existence *exclusively* upon the demand of the federating provinces through the instrument of Imperial sovereignty."[310] Therefore, it is possible to comprehend the present-day Canadian constitution based upon popular sovereignty instead of Imperial sovereignty, in which the above formula should be applied, with only that alteration in the conception of the basis of sovereignty. The corollary would be that the federal government is a "permanent enactment" that can be altered *exclusively* upon the demand of the federating provinces through the instrument of popular sovereignty. Thus the Canadian people are sovereign, but this sovereignty is expressed through the medium of the provinces. As stated earlier, this does not mean that Canada is merely a "treaty of union" among ten sovereign states from which any unit can unilaterally withdraw. In 1867 the colonies renounced this "pretension." The substitution of imperial sovereignty with popular sovereignty did not nullify this renunciation, for this renunciation was an act of the federating colonies, not an act of the Imperial Parliament and Imperial sovereignty. Thus the modern Canadian polity adheres to the modern conception of federalism: the Canadian people are sovereign both as a single body through the federal government as well as through the ten provincial bodies,[311] each free to construct its own constitution in its own agreed upon sphere of sovereignty, but required to obtain consent for an alteration of the relations between governments. *The 1982 patriation was thus illegitimate and perhaps should have been declared illegal because it used the old instrument of Imperial Sovereignty, and not merely its façade, to impose a change in the powers of the various governments without the consent of the provinces*. This patriation was even more illegitimate because it failed to secure the consent of the one unit which the BNA had identified as particular. Thus the irony that, since 1982, Quebec has defended English constitutionalism whereas English Canada has largely adopted French constitutionalism.

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[310] *supra*, Chapter 3, Section IV.

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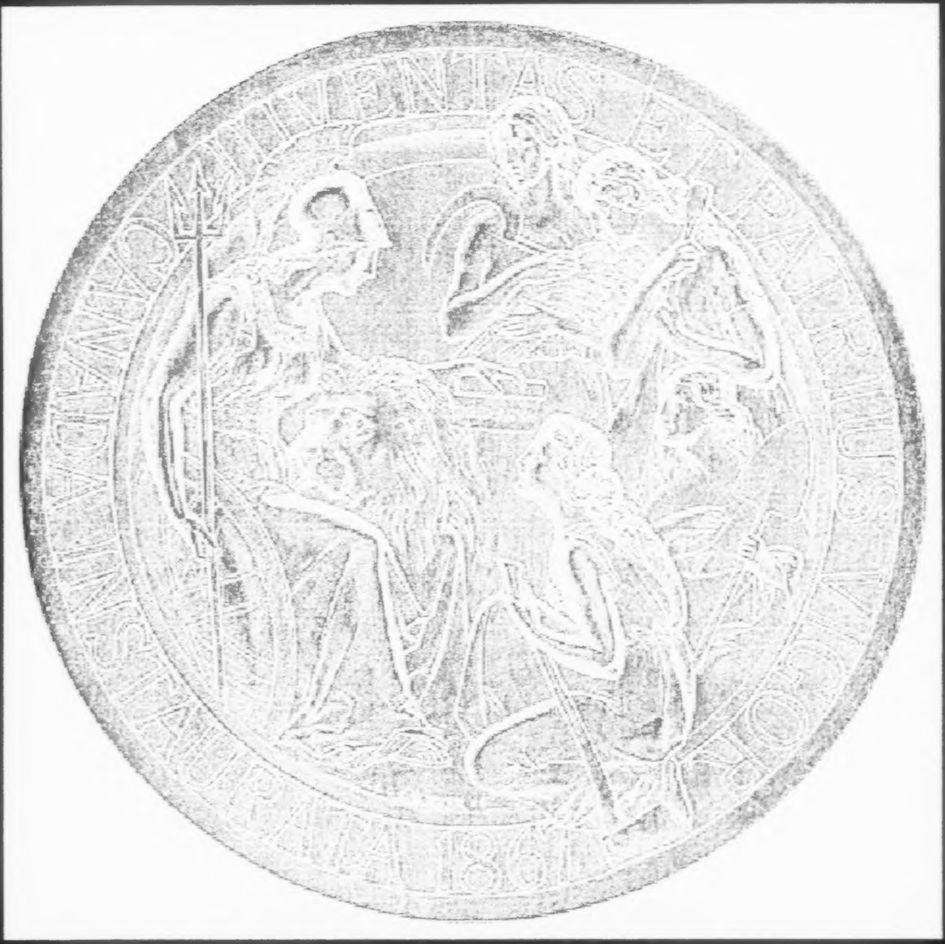
[311] As I stated in my introduction, for analytical purposes I am specifically avoiding any discussions of the impact of Aboriginal sovereignty on the Canadian polity, as it largely was contemporaneously ignored.

However, it was also provided that all the provinces can be equal while at the same time Quebec can be equal to the rest of Canada. Equality of nations (or dualism) and equality of provinces are not mutually exclusive conceptions. Colonial law at Confederation held that in a strict sense all colonies were equal no matter how styled, yet among these equals certain colonies had special status that made them different from other colonies or equal to a collectivity of other colonies. This notion was reflected in the composition of the Canadian Senate. All the provinces were granted the same ability to exercise certain legal powers no matter their size or cultural significance, but Quebec and Ontario were granted special status. The construction of the BNA Act and a contemporary understanding of the peculiarities of Quebec recognized a dual relationship between the province of Quebec with its unique civil code legal system and its French majority with an English minority to that of Canada with its (hopefully unified) common law legal system and its English majority with a French minority. In the BNA Act, Quebec's vision of dualism is constructed partially by specific parallels created between the federal Parliament and Quebec's legislature, such as its full parliament with a Royal Seat of Government (residence of the Governor-General) and a specially protected separate legal system.

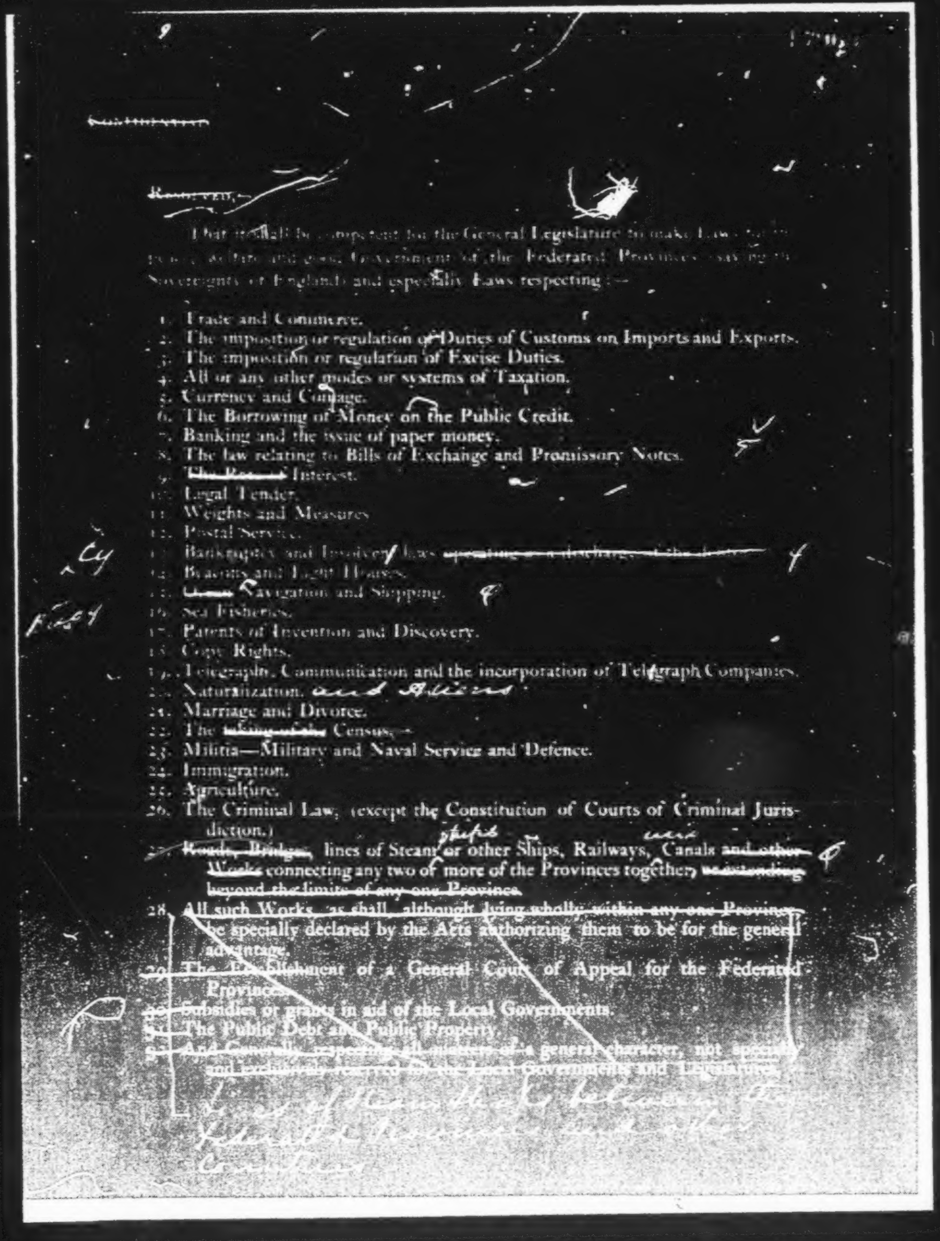
In 1867, the Colonial Office constituted Canadian Confederation, based upon a colonial proposal, in a way that recognised and incorporated the major political (decentralization) and sociological (dualism) realities that defined Canada; while providing a system for collective action among those colonies. These major political and sociological realities continue to define Canada to this day. Although many scholars will admit that these realities are ones that should and must be accommodated in Canada's constitutional order, they refuse to recognize that they were accommodated in the original BNA Act. Since the BNA Act used language on theoretical conceptions that were alien to some British North Americans at the time of Confederation and were to become universally alien as the decades passed, we have consistently misinterpreted the intent and the words of the Canadian constitution. Canadian constitutionalism has taken words that conveyed a certain ideal, and warped their meaning by applying modern conceptions. The meaning of words change with time. If we are to understand the past and Canada's constitution, we must recognize that the meaning originally inherent in the words of the BNA Act did not mean the same thing in 1867 that they do today.

Figure 1 – *Canada Instaurata 1867, Juventas et Patrius Vigor*. Confederation Medal (reverse), 1867. Reproduced from the National Library of Canada's website (www.nlc-bnc.ca). See also Janet Ajzenstat, Paul Romney, Ian Gentles, William D. Gairdner (eds), *Canada's Founding Debates* (Toronto: Stoddart, 1999), 3.



This the medallion struck upon Queen Victoria's Permission to commemorate Canadian Confederation. The medallion reads "Canada Instaurata 1867, Juventas et Patrius Vigor" which translates as "Canada Reorganized 1867, Youth and Ancestral Vigour." The image portrays Britannia (the personification of the British Empire) giving Confederation to Ontario (with sickle), Quebec (with paddle), Nova Scotia (with mining spade) and New Brunswick (with timber axe).

Figure 2 – Type-written note inserted into hand-written minutes, John A. Macdonald's motion, 10 o'clock, Friday 21 October 1864. From the National Archives of Canada, "Minutes of the Proceedings for the Quebec Conference, October 10-29, 1864" *Macdonald Papers* MG26 A, vol. 46, p. 17965.



9 17965

~~[illegible]~~

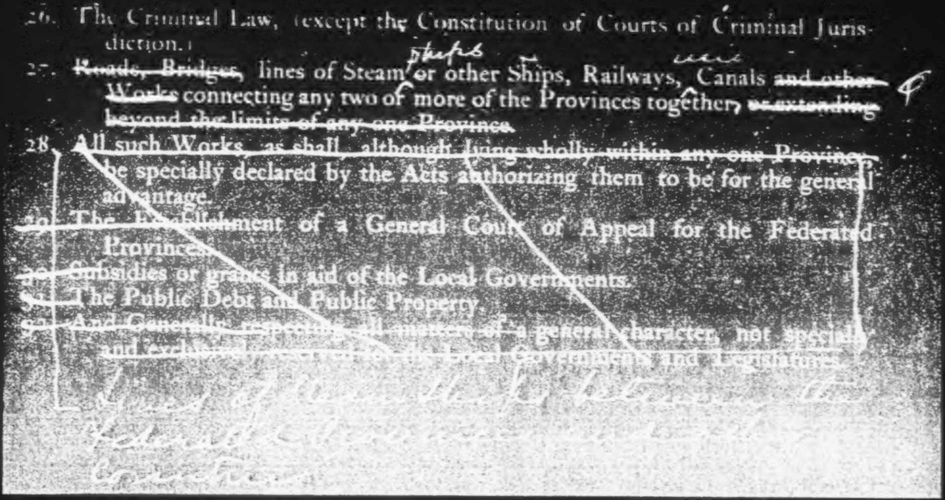
~~Resolved,~~

That it shall be competent for the General Legislature to make Laws for the peace, welfare and good Government of the Federated Provinces (saving the Sovereignty of England) and especially Laws respecting:—

1. Trade and Commerce.
2. The imposition or regulation of Duties of Customs on Imports and Exports.
3. The imposition or regulation of Excise Duties.
4. All or any other modes or systems of Taxation.
5. Currency and Coinage.
6. The Borrowing of Money on the Public Credit.
7. Banking and the issue of paper money.
8. The law relating to Bills of Exchange and Promissory Notes.
9. ~~The Rate of~~ Interest.
10. Legal Tender.
11. Weights and Measures.
12. Postal Service.
13. Bankruptcy and Insolvency laws ~~operating as a discharge of the debtor~~
14. Beacons and Light Houses.
15. ~~Ocean~~ Navigation and Shipping.
16. Sea Fisheries.
17. Patents of Invention and Discovery.
18. Copy Rights.
19. Telegraphic Communication and the incorporation of Telegraph Companies.
20. Naturalization. and Aliens
21. Marriage and Divorce.
22. The ~~taking of the~~ Census.
23. Militia—Military and Naval Service and Defence.
24. Immigration.
25. Agriculture.
26. The Criminal Law, (except the Constitution of Courts of Criminal Jurisdiction.)
27. ~~Roads, Bridges,~~ lines of Steam or other Ships, Railways, Canals ~~and other Works~~ connecting any two or more of the Provinces together, ~~or extending beyond the limits of any one Province.~~
28. ~~All such Works as shall, although lying wholly within any one Province, be specially declared by the Acts authorizing them to be for the general advantage.~~
29. ~~The Establishment of a General Court of Appeal for the Federated Provinces.~~
30. ~~Subsidies or grants in aid of the Local Governments.~~
31. ~~The Public Debt and Public Property.~~
32. ~~And Generally respecting all matters of a general character, not specially and exclusively reserved for the Local Governments and Legislatures.~~

[illegible] between the Federated Provinces and other Countries

Figure 3 – Enlarged portion from a Type-written note inserted into hand-written minutes, John A. Macdonald's motion, 10 o'clock, Friday 21 October 1864. From the National Archives of Canada, "Minutes of the Proceedings for the Quebec Conference, October 10-29, 1864" *Macdonald Papers* MG26 A, vol. 46, p. 17965.



26. The Criminal Law, (except the Constitution of Courts of Criminal Jurisdiction.)

27. ~~Roads, Bridges,~~ lines of Steam ships or other Ships, Railways, Canals ~~and other Works~~ connecting any two or more of the Provinces together~~, or extending beyond the limits of any one Province.~~ 4

28. ~~All such Works, as shall, although lying wholly within any one Province,~~ be specially declared by the Acts authorizing them to be for the general advantage.

29. The Establishment of a General Court of Appeal for the Federated Provinces.

30. Subsidies or grants in aid of the Local Governments.

31. The Public Debt and Public Property.

32. ~~And Generally respecting all matters of a general character, not specially~~ and exclusively reserved for the Local Governments and Legislatures.

[illegible]

Figure 4 – Proceedings from Friday 21 October 1864. From the National Archives of Canada, "Minutes of the Proceedings for the Quebec Conference, October 10-29, 1864" *Macdonald Papers* MG26 A, vol. 46, p. 17975.

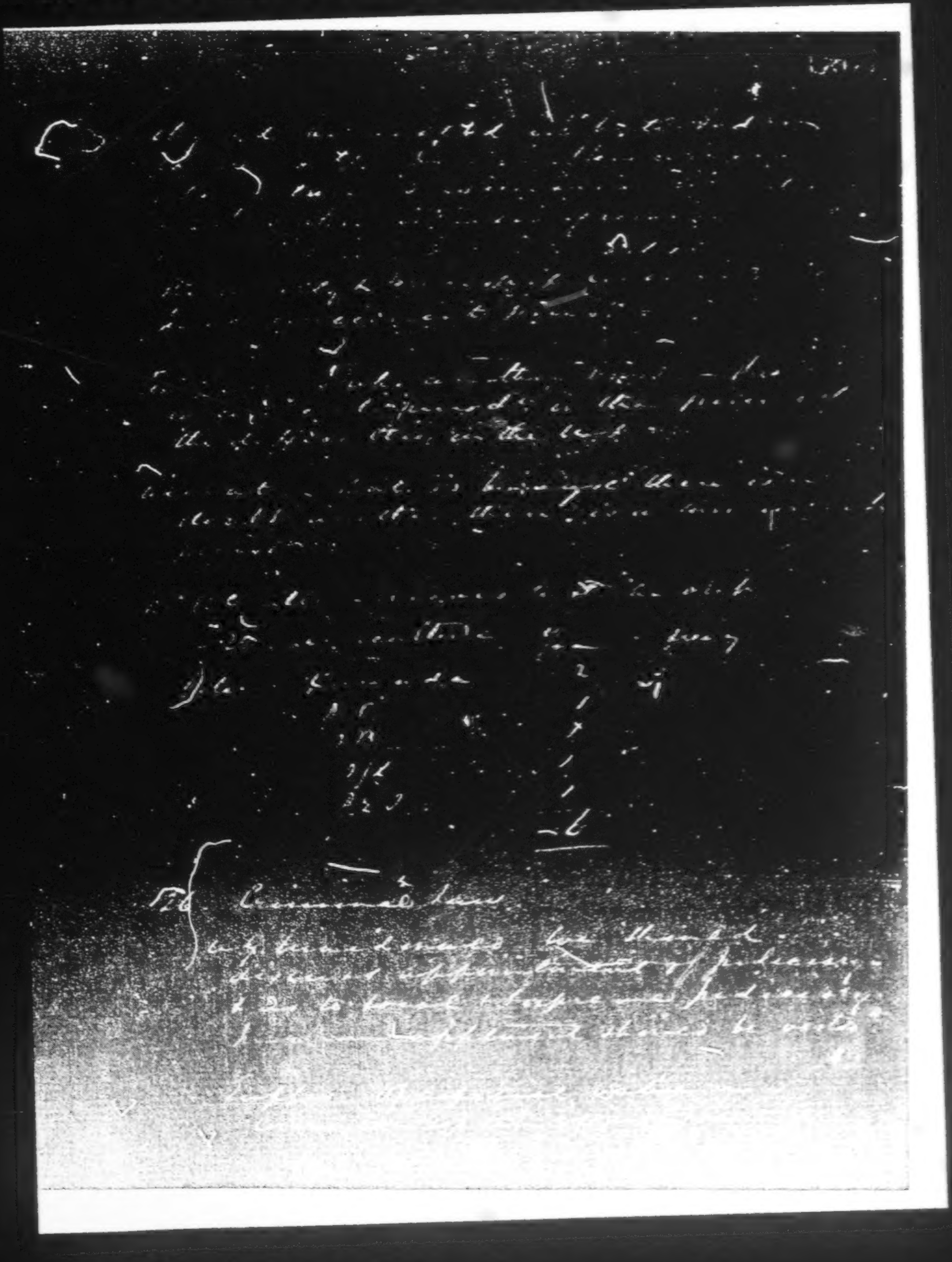


Figure 5 – Proceedings from Friday 21 October 1864. From the National Archives of Canada, "Minutes of the Proceedings for the Quebec Conference, October 10-29, 1864" *Macdonald Papers* MG26 A, vol. 46, p. 17976.

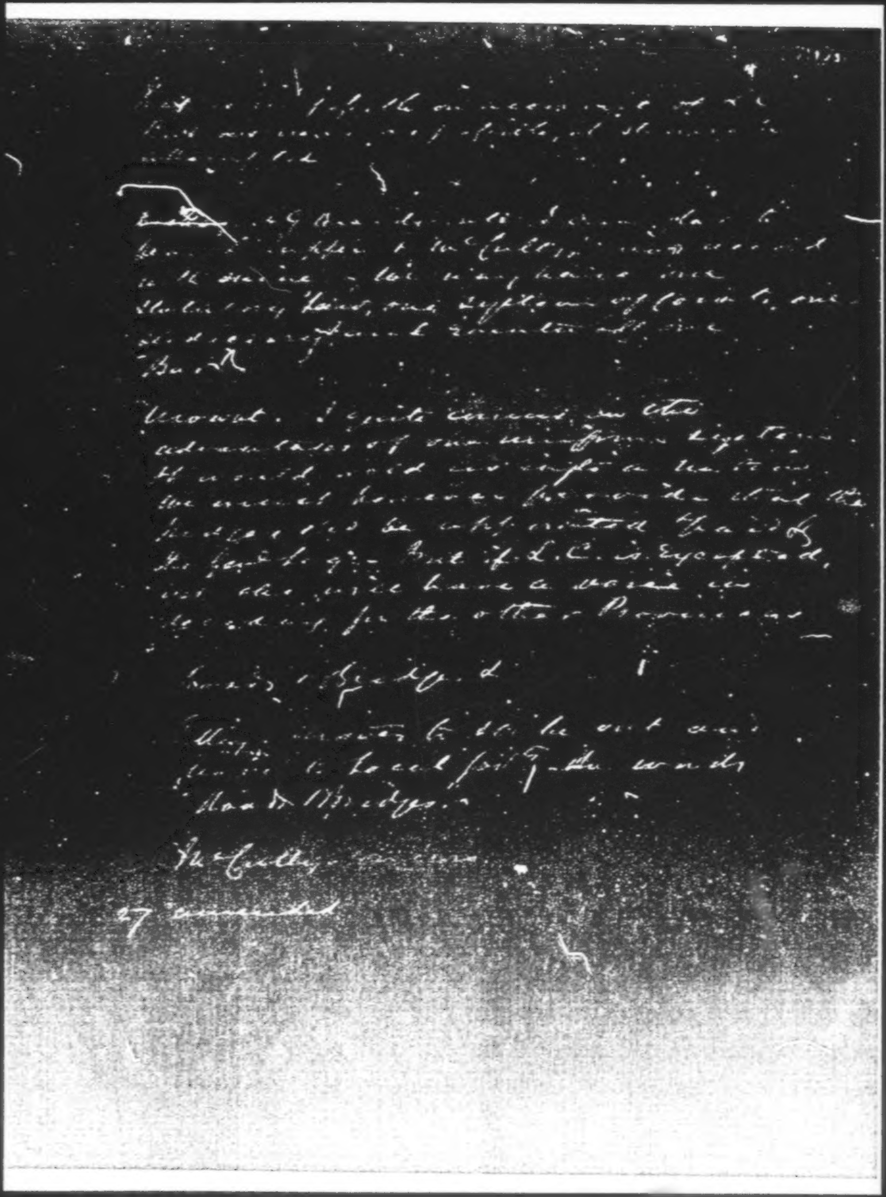
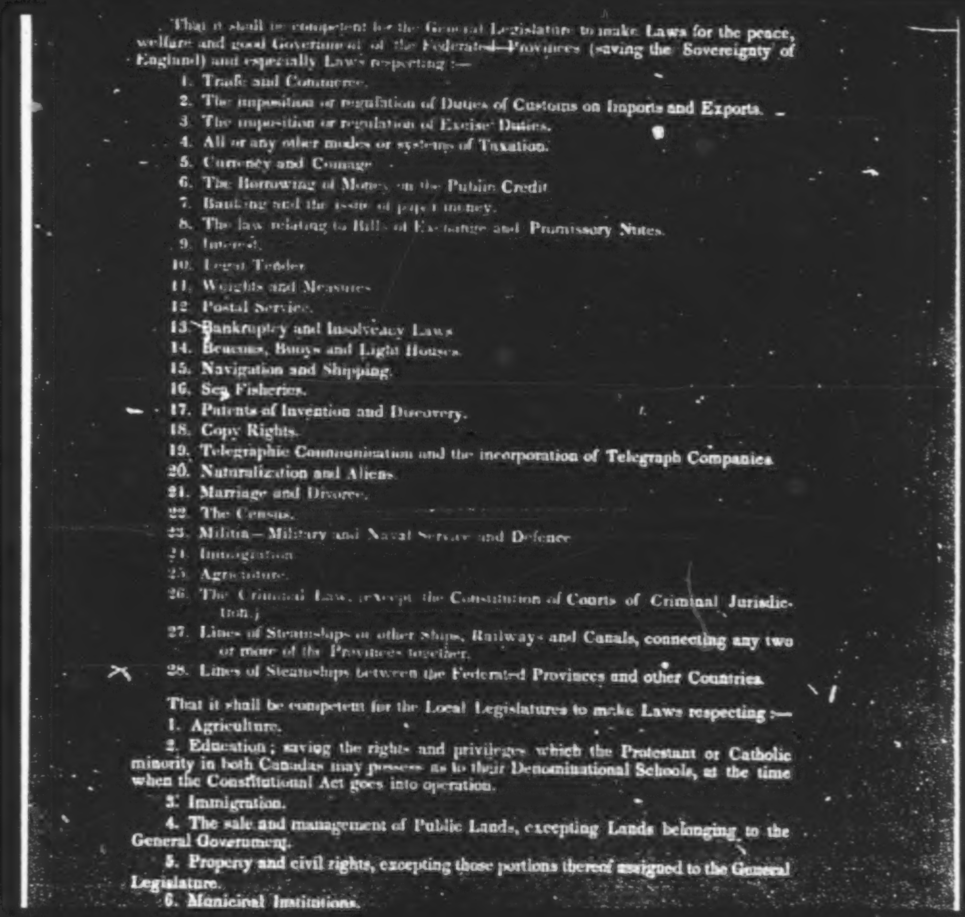


Figure 6 – Selection from National Archives of Canada, "Draft Resolutions, Quebec Conference" *Macdonald Papers* MG26 A, vol. 46, p. 18166.



That it shall be competent for the General Legislature to make Laws for the peace, welfare and good Government of the Federated Provinces (saving the Sovereignty of England) and especially Laws respecting :—

1. Trade and Commerce.
2. The imposition or regulation of Duties of Customs on Imports and Exports.
3. The imposition or regulation of Excise Duties.
4. All or any other modes or systems of Taxation.
5. Currency and Coinage.
6. The Borrowing of Money on the Public Credit.
7. Banking and the issue of paper money.
8. The law relating to Bills of Exchange and Promissory Notes.
9. Interest.
10. Legal Tender.
11. Weights and Measures.
12. Postal Service.
13. Bankruptcy and Insolvency Laws.
14. Beacons, Buoys and Light Houses.
15. Navigation and Shipping.
16. Sea Fisheries.
17. Patents of Invention and Discovery.
18. Copy Rights.
19. Telegraphic Communication and the incorporation of Telegraph Companies.
20. Naturalization and Aliens.
21. Marriage and Divorce.
22. The Census.
23. Militia—Military and Naval Service and Defence.
24. Immigration.
25. Agriculture.
26. The Criminal Law, (except the Constitution of Courts of Criminal Jurisdiction.)
27. Lines of Steamships or other Ships, Railways and Canals, connecting any two or more of the Provinces together.
28. Lines of Steamships between the Federated Provinces and other Countries.

That it shall be competent for the Local Legislatures to make Laws respecting :—

1. Agriculture.

2. Education; saving the rights and privileges which the Protestant or Catholic minority in both Canadas may possess as to their Denominational Schools, at the time when the Constitutional Act goes into operation.

3. Immigration.

4. The sale and management of Public Lands, excepting Lands belonging to the General Government.

5. Property and civil rights, excepting those portions thereof assigned to the General Legislature.

6. Municipal Institutions.

Table 1 – Lord Carnarvon's description of the division of powers in Canada under the *British North America Act, 1867*

EXCLUSIVE FEDERAL POWERS
1. **Public financial liabilities and assets**: "The public debt or property… loans, the raising of revenue by any mode or system of taxation" and "the assets, property, debts, and liabilities of each will be transferred to the central body." 2. **Regulation of trade and commerce**: "Regulations with regard to trade or commerce, customs and excise, loans, the raising of revenue by any mode or system of taxation… navigation and shipping" 3. **Currency, banking, and statistics**: "Provisions as to currency, coinage, banking, postal arrangements, the regulation of the census, and the issues and collection of statistics 4. **The *enactment* of criminal law**: "The enactment of criminal law" 5. **Maritime issues and naval and military defence**: "the fisheries, the navigation and shipping, the quarantine regulations, the lighting of the coast, and the general question of naval and military defence, will be placed under the exclusive control of the Central Government"
EXCLUSIVE PROVINCIAL POWERS
1. **Management of public lands and minerals**: "the sale and management of public lands" and "lands and minerals are reserved to the several provinces" 2. **'Municipal' institutions**: "the control of their hospitals, asylums, charitable, and municipal institutions" 3. **Direct taxation**: "the raising of money by means of direct taxations" 4. **Administration of the legal system**: "The administration of it [criminal law] is vested in the local authorities" 5. **Amendment of their own constitutions**: "in conformity with all recent colonial legislation, the Provincial Legislatures are empowered to amend their own constitutions."
CONCURRENT POWERS
1. **Immigration**: "will be in most cases probably treated by the Provincial authorities" 2. **Agriculture**: "will be in most cases probably treated by the Provincial authorities" 3. **Public Works**: "Public works fall into two classes: First, those which are purely local, such as roads and bridges, and municipal buildings…. Secondly there are public works which, though possibly situated in a single Province, such as telegraphs, and canals, and railways, are yet of common import and value to the entire Confederation, and ever these it is clearly right that the Central Government should exercise a controlling authority."
EXCEPTIONAL PROVISION
• **Education**: "It is an understanding which, as it only concerns the local interests affected, is not one that Parliament would be willing to disturb, even if in the opinion of Parliament it were susceptible of amendment… but in the event of any wrong at the hand of the local majority, the minority have a right of appeal to the Governor General in Council"

Table 2 – Outline of Lord Carnarvon's Speech to the House of Lord Introduction the British North America Bill for Second Reading.

Section		Column
I.	Introduction and background	557-558
II.	Basis and Potential expanse of the Union	558-559
III.	Governors	559
IV.	Legislatures – Local and General	559
V.	Upper House of General Legislature	559-561
VI.	Lower House of General Legislature	561-562
VII.	Local Legislatures	562-563
VIII.	Division of Powers	563-566
IX.	Revenue, assets, and liabilities	566-567
X.	Designation of the Union	567-568
XI.	Objections to the Union	568-573
XII.	Anticipated Advantages	573-576a
XIII.	Conclusion	576a-576b

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Appendix A

I. *British North America Act, 1867*, 30 & 31 Victoria, c. 3 (UK), unamended and abridged

The British North America Act, 1867

An Act for the Union of Canada, Nova Scotia, and New Brunswick, and the Government thereof; and for Purposes connected therewith.

[29th March, 1867.]

Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom:

And whereas such a Union would conduce to the Welfare of the Provinces and promote the Interests of the British Empire:

And whereas on the Establishment of the Union by Authority of Parliament it is expedient, not only that the Constitution of the Legislative Authority in the Dominion be provided for, but also that the Nature of the Executive Government therein be declared:

And whereas it is expedient that Provision be made for the eventual Admission into the Union of other Parts of British North America:

Be it therefore enacted and declared by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

I.--PRELIMINARY.

1. [Short Title.] This Act may be cited as The British North America Act, 1867.

2. [Application of Provisions referring to the Queen.] The Provisions of this Act referring to Her Majesty the Queen extend also to the Heirs and Successors of Her Majesty, Kings and Queens of the United Kingdom of Great Britain and Ireland.

II.--UNION.

3. [Declaration of Union] It shall be lawful for the Queen, by and with the Advice of Her Majesty's Most Honourable Privy Council, to declare by Proclamation that, on and after a Day therein appointed, not being more than Six

Months after the passing of this Act, the Provinces of Canada, Nova Scotia, and New Brunswick shall form and be One Dominion under the Name of Canada; and on and after that Day those Three Provinces shall form and be One Dominion under that Name accordingly.

4. [Construction of subsequent Provisions of Act.] The subsequent Provisions of this Act shall, unless it is otherwise expressed or implied, commence and have effect on and after the Union, that is to say, on and after the Day appointed for the Union taking effect in the Queen's Proclamation; and in the same Provisions, unless it is otherwise expressed or implied, the Name Canada shall be taken to mean Canada as constituted under this Act.

5. [Four Provinces.] Canada shall be divided into Four Provinces, named Ontario, Quebec, Nova Scotia, and New Brunswick.

6. [Provinces of Ontario and Quebec.] The Parts of the Province of Canada (as it exists at the passing of this Act) which formerly constituted respectively the Provinces of Upper Canada and Lower Canada shall be deemed to be severed, and shall form two separate Provinces. The Part which formerly constituted the Province of Upper Canada shall constitute the Province of Ontario; and the Part which formerly constituted the Province of Lower Canada shall constitute the Province of Quebec.

7. [Provinces of Nova Scotia and New Brunswick.] The Provinces of Nova Scotia and New Brunswick shall have the same Limits as at the passing of this Act.

8. [Decennial Census.] In the general Census of the Population of Canada which is hereby required to be taken in the Year One thousand eight hundred and seventy-one, and in every Tenth Year thereafter, the respective Populations of the Four Provinces shall be distinguished.

III.--EXECUTIVE POWER.

9. [Declaration of Executive Power in the Queen.] The Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen.

10. [Application of Provisions referring to Governor General.] The Provisions of this Act referring to the Governor General extend and apply to the Governor General for the Time being of Canada, or other the Chief Executive Officer or Administrator for the Time being carrying on the Government of Canada on behalf and in the Name of the Queen, by whatever Title he is designated.

11. [Constitution of Privy Council for Canada.] There shall be a Council to aid and advise in the Government of Canada, to be styled the Queen's Privy Council for Canada; and the Persons who are to be Members of that Council shall be from Time to Time chosen and summoned by the Governor General and sworn

in as Privy Councillors, and Members thereof may be from Time to Time removed by the Governor General.

12. [All Powers under Acts to be exercised by Governor General with Advice of Privy Council, or alone.] All Powers, Authorities, and Functions which under any Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick, are at the Union vested in or exerciseable by the respective Governors or Lieutenant Governors of those Provinces, with the Advice, or with the Advice and Consent, of the respective Executive Councils thereof, or in conjunction with those Councils, or with any Number of Members thereof, or by those Governors or Lieutenant Governors individually, shall, as far as the same continue in existence and capable of being exercised after the Union in relation to the Government of Canada, be vested in and exerciseable by the Governor General, with the Advice or with the Advice and Consent of or in conjunction with the Queen's Privy Council for Canada, or any Members thereof, or by the Governor General individually, as the Case requires, subject nevertheless (except with respect to such as exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland) to be abolished or altered by the Parliament of Canada.

13. [Application of Provisions referring to Governor General in Council.] The Provisions of this Act referring to the Governor General in Council shall be construed as referring to the Governor General acting by and with the Advice of the Queen's Privy Council for Canada.

14. [Power to Her Majesty to authorize Governor General to appoint Deputies.] It shall be lawful for the Queen, if Her Majesty thinks fit, to authorize the Governor General from Time to Time to appoint any Person or any Persons jointly or severally to be his Deputy or Deputies within any Part or Parts of Canada, and in that Capacity to exercise during the Pleasure of the Governor General such of the Powers, Authorities, and Functions of the Governor General as the Governor General deems it necessary or expedient to assign to him or them, subject to any Limitations or Directions expressed or given by the Queen; but the Appointment of such a Deputy or Deputies shall not affect the Exercise by the Governor General himself of any Power, Authority, or Function.

15. [Command of Armed Forces to continue to be vested in the Queen.] The Command-in-Chief of the Land and Naval Militia, and of all Naval and Military Forces, of and in Canada, is hereby declared to continue and be vested in the Queen.

16. [Seat of Government of Canada.] Until the Queen otherwise directs the Seat of Government of Canada shall be Ottawa.

IV.--LEGISLATIVE POWER.

17. [Constitution of Parliament of Canada.] There shall be One Parliament for Canada, consisting of the Queen, an Upper House styled the Senate, and the House of Commons.

18. [Privileges, &c. of Houses.] The Privileges, Immunities, and Powers to be held, enjoyed, and exercised by the Senate and by the House of Commons and by the Members thereof respectively shall be such as are from Time to Time defined by Act of the Parliament of Canada, but so that the same shall never exceed those at the passing of this Act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland and by the Members thereof.

19. [First Session of the Parliament of Canada.] The Parliament of Canada shall be called together not later than Six Months after the Union.

20. [Yearly Session of the Parliament of Canada.] There shall be a Session of the Parliament of Canada once at least in every Year, so that Twelve Months shall not intervene between the last Sitting of the Parliament in one Session and its first Sitting in the next Session.

The Senate.

21. [Number of Senators.] The Senate shall, subject to the Provisions of this Act, consist of Seventy-two Members, who shall be styled Senators.

22. [Representation of Provinces in Senate.] In relation to the Constitution of the Senate, Canada shall be deemed to consist of Three Divisions:

1. Ontario;
2. Quebec;

3. The Maritime Provinces, Nova Scotia and New Brunswick;

which Three Divisions shall (subject to the Provisions of this Act) be equally represented in the Senate as follows: Ontario by Twenty-four Senators; Quebec by Twenty-four Senators; and the Maritime Provinces by Twenty-four Senators, Twelve thereof representing Nova Scotia, and Twelve thereof representing New Brunswick.

In the Case of Quebec each of the Twenty-four Senators representing that Province shall be appointed for One of the Twenty-four Electoral Divisions of Lower Canada specified in Schedule A. to Chapter One of the Consolidated Statutes of Canada.

23. [Qualifications of Senator.] The Qualifications of a Senator shall be as follows:

(1.) He shall be of the full age of Thirty Years:

(2.) He shall be either a Natural-born Subject of the Queen, or a Subject of the Queen naturalized by an Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of One of the Provinces of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick, before the Union, or of the Parliament of Canada after the Union:

(3.) He shall be legally or equitably seised as of Freehold for his own Use and Benefit of Lands or Tenements held in Free and Common Socage, or seised or possessed for his own Use and Benefit of Lands or Tenements held in Franc-alleu or in Roture, within the Province for which he is appointed, of the Value of Four thousand Dollars, over and above all Rents, Dues, Debts, Charges, Mortgages, and Incumbrances due or payable out of or charged on or affecting the same:

(4.) His Real and Personal Property shall be together worth Four thousand Dollars over and above his Debts and Liabilities:

(5.) He shall be resident in the Province for which he is appointed:

(6.) In the case of Quebec he shall have his Real Property Qualification in the Electoral Division for which he is appointed, or shall be resident in that Division.

24. [Summons of Senator.] The Governor General shall from Time to Time, in the Queen's Name, by Instrument under the Great Seal of Canada, summon qualified Persons to the Senate; and, subject to the Provisions of this Act, every Person so summoned shall become and be a Member of the Senate and a Senator.

25. [Summons of First Body of Senators.] Such Persons shall be first summoned to the Senate as the Queen by Warrant under Her Majesty's Royal Sign Manual thinks fit to approve, and their Names shall be inserted in the Queen's Proclamation of Union.

26. [Addition of Senators in certain Cases.] If at any Time on the Recommendation of the Governor General the Queen thinks fit to direct that Three or Six Members be added to the Senate, the Governor General may by Summons to Three or Six qualified Persons (as the Case may be), representing equally the Three Divisions of Canada, add to the Senate accordingly.

27. [Reduction of Senate to normal number.] In case of such Addition being at any Time made, the Governor General shall not summon any Person to the Senate, except on a further like Direction by the Queen on the like Recommendation, until each of the Three Divisions of Canada is represented by Twenty-four Senators and no more.

28. [Maximum Number of Senators.] The Number of Senators shall not at any Time exceed Seventy-eight.

29. [Tenure of Place in Senate.] A Senator shall, subject to the Provisions of this Act, hold his Place in the Senate for Life.

30. [Resignation of Place in Senate.] A Senator may by Writing under his Hand addressed to the Governor General resign his Place in the Senate, and thereupon the same shall be vacant.

31. [Disqualification of Senators.] The Place of a Senator shall become vacant in any of the following Cases:--

(1.) If for Two consecutive Sessions of the Parliament he fails to give his Attendance in the Senate:

(2.) If he takes an Oath or makes a Declaration or Acknowledgment of Allegiance, Obedience, or Adherence to a Foreign Power, or does an Act whereby he becomes a Subject or Citizen, or entitled to the Rights or Privileges of a Subject or Citizen, of a Foreign Power:

(3.) If he is adjudged Bankrupt or Insolvent, or applies for the Benefit of any Law relating to Insolvent Debtors, or becomes a public Defaulter:

(4.) If he is attainted of Treason or convicted of Felony or of any infamous Crime:

(5.) If he ceases to be qualified in respect of Property or of Residence; provided, that a Senator shall not be deemed to have ceased to be qualified in respect of Residence by reason only of his residing at the Seat of the Government of Canada while holding an Office under that Government requiring his Presence there.

32. [Summons on Vacancy in Senate.] When a Vacancy happens in the Senate by Resignation, Death, or otherwise, the Governor General shall by Summons to a fit and qualified Person fill the Vacancy.

33. [Questions as to Qualifications and Vacancies in Senate.] If any Question arises respecting the Qualification of a Senator or a Vacancy in the Senate the same shall be heard and determined by the Senate.

34. [Appointment of Speaker of Senate.] The Governor General may from Time to Time, by Instrument under the Great Seal of Canada, appoint a Senator to be Speaker of the Senate, and may remove him and appoint another in his Stead.

35. [Quorum of Senate.] Until the Parliament of Canada otherwise provides, the Presence of at least Fifteen Senators, including the Speaker, shall be necessary to constitute a Meeting of the Senate for the Exercise of its Powers.

36. [Voting in Senate.] Questions arising in the Senate shall be decided by a Majority of Voices, and the Speaker shall in all Cases have a Vote, and when the Voices are equal the Decision shall be deemed to be in the Negative.

The House of Commons.

37. [Constitution of House of Commons in Canada.] The House of Commons shall, subject to the Provisions of this Act, consist of One hundred and eighty-one Members, of whom Eighty-two shall be elected for Ontario, Sixty-five for Quebec, Nineteen for Nova Scotia, and Fifteen for New Brunswick.

38. [Summoning of House of Commons.] The Governor General shall from Time to Time, in the Queen's Name, by Instrument under the Great Seal of Canada, summon and call together the House of Commons.

39. [Senators not to sit in House of Commons.] A Senator shall not be capable of being elected or of sitting or voting as a Member of the House of Commons.

40. [Electoral Districts of the Four Provinces.] Until the Parliament of Canada otherwise provides, Ontario, Quebec, Nova Scotia, and New Brunswick shall, for the Purposes of the Election of Members to serve in the House of Commons, be divided into Electoral Districts as follows:

1.--ONTARIO.

Ontario shall be divided into the Counties, Ridings of Counties, Cities, Parts of Cities, and Towns enumerated in the First Schedule to this Act, each whereof shall be an Electoral District, each such District as numbered in that Schedule being entitled to return One Member.

2.--QUEBEC.

Quebec shall be divided into Sixty-five Electoral Districts, composed of the Sixty-five Electoral Divisions into which Lower Canada is at the passing of this Act divided under Chapter Two of the Consolidated Statutes of Canada, Chapter Seventy-five of the Consolidated Statutes for Lower Canada, and the Act of the Province of Canada of the Twenty-third Year of the Queen, Chapter One, or any other Act amending the same in force at the Union, so that each such Electoral Division shall be for the Purposes of this Act an Electoral District entitled to return One Member.

3.--NOVA SCOTIA.

Each of the Eighteen Counties of Nova Scotia shall be an Electoral District. The County of Halifax shall be entitled to return Two Members, and each of the other Counties One Member.

4.--NEW BRUNSWICK.

Each of the Fourteen Counties into which New Brunswick is divided, including the City and County of St. John, shall be an Electoral District; The City of St. John shall also be a separate Electoral District. Each of those Fifteen Electoral Districts shall be entitled to return One Member.

41. [Continuance of existing Election Laws until Parliament of Canada otherwise provides.] Until the Parliament of Canada otherwise provides, all Laws in force in the several Provinces at the Union relative to the following Matters or any of them, namely,--the Qualifications and Disqualifications of Persons to be elected or to sit or vote as Members of the House of Assembly or Legislative Assembly in the several Provinces, the Voters at Elections of such Members, the Oaths to be taken by Voters, the Returning Officers, their Powers and Duties, the Proceedings at Elections, the Periods during which Elections may be continued, the Trial of controverted Elections, and Proceedings incident thereto, the vacating of Seats of Members, and the Execution of new Writs in case of Seats vacated otherwise than by Dissolution,--shall respectively apply to Elections of Members to serve in the House of Commons for the same several Provinces.

Provided that, until the Parliament of Canada otherwise provides, at any Election for a Member of the House of Commons for the District of Algoma, in addition to Persons qualified by the Law of the Province of Canada to vote, every male British Subject, aged Twenty-one Years or upwards, being a Householder, shall have a Vote.

42. [Writs for First Election.] For the First Election of Members to serve in the House of Commons the Governor General shall cause Writs to be issued by such Person, in such Form, and addressed to such Returning Officers as he thinks fit.

The Person issuing Writs under this Section shall have the like Powers as are possessed at the Union by the Officers charged with the issuing of Writs for the Election of Members to serve in the respective House of Assembly or Legislative Assembly of the Province of Canada, Nova Scotia, or New Brunswick; and the Returning Officers to whom Writs are directed under this Section shall have the like Powers as are possessed at the Union by the Officers charged with the returning of Writs for the Election of Members to serve in the same respective House of Assembly or Legislative Assembly.

43. [As to Casual Vacancies.] In case a Vacancy in the Representation in the House of Commons of any Electoral District happens before the Meeting of the Parliament, or after the Meeting of the Parliament before Provision is made by the Parliament in this Behalf, the Provisions of the last foregoing Section of this Act shall extend and apply to the issuing and returning of a Writ in respect of such Vacant District.

44. [As to Election of Speaker of House of Commons.] The House of Commons on its first assembling after a General Election shall proceed with all practicable Speed to elect One of its Members to be Speaker.

45. [As to filling up Vacancy in Office of Speaker.] In case of a Vacancy happening in the Office of Speaker by Death, Resignation, or otherwise, the House of Commons shall with all practicable Speed proceed to elect another of its Members to be Speaker.

46. [Speaker to preside.] The Speaker shall preside at all Meetings of the House of Commons.

47. [Provision in case of Absence of Speaker.] Until the Parliament of Canada otherwise provides, in case of the Absence for any Reason of the Speaker from the Chair of the House of Commons for a Period of Forty-eight consecutive Hours, the House may elect another of its Members to act as Speaker, and the Member so elected shall during the Continuance of such Absence of the Speaker have and execute all the Powers, Privileges, and Duties of Speaker.

48. [Quorum of House of Commons.] The Presence of at least Twenty Members of the House of Commons shall be necessary to constitute a Meeting of the House for the Exercise of its Powers; and for that Purpose the Speaker shall be reckoned as a Member.

49. [Voting in House of Commons.] Questions arising in the House of Commons shall be decided by a Majority of Voices other than that of the Speaker, and when the Voices are equal, but not otherwise, the Speaker shall have a Vote.

50. [Duration of House of Commons.] Every House of Commons shall continue for Five Years from the Day of the Return of the Writs for choosing the House (subject to be sooner dissolved by the Governor General), and no longer.

51. [Decennial Re-adjustment of Representation.] On the Completion of the Census in the Year One thousand eight hundred and seventy-one, and of each subsequent decennial Census, the Representation of the Four Provinces shall be readjusted by such Authority, in such Manner, and from such Time, as the Parliament of Canada from Time to Time provides, subject and according to the following Rules:

(1.) Quebec shall have the fixed Number of Sixty-five Members:

(2.) There shall be assigned to each of the other Provinces such a Number of Members as will bear the same Proportion to the Number of its Population (ascertained at such Census) as the Number Sixty-five bears to the Number of the Population of Quebec (so ascertained):

(3.) In the Computation of the Number of Members for a Province a fractional Part not exceeding One Half of the whole Number requisite for entitling the Province to a Member shall be disregarded; but a fractional Part exceeding One Half of that Number shall be equivalent to the whole Number:

(4.) On any such Re-adjustment the Number of Members for a Province shall not be reduced unless the Proportion which the Number of the Population of the Province bore to the Number of the aggregate Population of Canada at the then last preceding Re-adjustment of the Number of Members for the Province is ascertained at the then latest Census to be diminished by One Twentieth Part or upwards:

(5.) Such Re-adjustment shall not take effect until the Termination of the then existing Parliament.

52. [Increase of Number of House of Commons.] The Number of Members of the House of Commons may be from Time to Time increased by the Parliament of Canada, provided the proportionate Representation of the Provinces prescribed by this Act is not thereby disturbed.

Money Votes; Royal Assent.

53. [Appropriation and tax Bills.] Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.

54. [Recommendation of Money Votes.] It shall not be lawful for the House of Commons to adopt or pass any Vote, Resolution, Address, or Bill for the Appropriation of any Part of the Public Revenue, or of any Tax or Impost, to any Purpose that has not been first recommended to that House by Message of the Governor General in the Session in which such Vote, Resolution, Address, or Bill is proposed.

55. [Royal Assent to Bills, &c.] Where a Bill passed by the Houses of the Parliament is presented to the Governor General for the Queen's Assent, he shall declare, according to his Discretion, but subject to the Provisions of this Act and to Her Majesty's Instructions, either that he assents thereto in the Queen's Name, or that he withholds the Queen's Assent, or that he reserves the Bill for the Signification of the Queen's Pleasure.

56. [Disallowance by Order in Council of Act assented to by Governor General.] Where the Governor General assents to a Bill in the Queen's Name, he shall by the first convenient Opportunity send an authentic Copy of the Act to One of Her Majesty's Principal Secretaries of State, and if the Queen in Council within Two Years after Receipt thereof by the Secretary of State thinks fit to disallow the Act, such Disallowance (with a Certificate of the Secretary of State of the Day on which the Act was received by him) being signified by the Governor General, by Speech or Message to each of the Houses of the Parliament or by Proclamation, shall annul the Act from and after the Day of such Signification.

57. [Signification of Queen's Pleasure on Bill reserved.] A Bill reserved for the Signification of the Queen's Pleasure shall not have any Force unless and until within Two Years from the Day on which it was presented to the Governor General for the Queen's Assent, the Governor General signifies, by Speech or Message to each of the Houses of the Parliament or by Proclamation, that it has received the Assent of the Queen in Council.

An Entry of every such Speech, Message, or Proclamation shall be made in the Journal of each House, and a Duplicate thereof duly attested shall be delivered to the proper Officer to be kept among the Records of Canada.

V.--PROVINCIAL CONSTITUTIONS.

Executive Power.

58. [Appointment of Lieutenant Governors of Provinces.] For each Province there shall be an Officer, styled the Lieutenant Governor, appointed by the Governor General in Council by Instrument under the Great Seal of Canada.

59. [Tenure of Office of Lieutenant Governor.] A Lieutenant Governor shall hold Office during the Pleasure of the Governor General; but any Lieutenant Governor appointed after the Commencement of the First Session of the Parliament of Canada shall not be removeable within Five Years from his Appointment, except for Cause assigned, which shall be communicated to him in Writing within One Month after the Order for his Removal is made, and shall be communicated by Message to the Senate and to the House of Commons within One Week thereafter if the Parliament is then sitting, and if not then within One Week after the Commencement of the next Session of the Parliament.

60. [Salaries of Lieutenant Governors.] The Salaries of the Lieutenant Governors shall be fixed and provided by the Parliament of Canada.

61. [Oaths, &c. of Lieutenant Governor.] Every Lieutenant Governor shall, before assuming the Duties of his Office, make and subscribe before the Governor General or some Person authorized by him Oaths of Allegiance and Office similar to those taken by the Governor General.

62. [Application of provisions referring to Lieutenant Governor.] The Provisions of this Act referring to the Lieutenant Governor extend and apply to the Lieutenant Governor for the Time being of each Province or other the Chief Executive Officer or Administrator for the Time being carrying on the Government of the Province, by whatever Title he is designated.

63. [Appointment of Executive Officers for Ontario and Quebec.] The Executive Council of Ontario and of Quebec shall be composed of such Persons as the Lieutenant Governor from Time to Time thinks fit, and in the first instance of the following Officers, namely,--the Attorney General, the Secretary and Registrar of the Province, the Treasurer of the Province, the Commissioner of Crown Lands, and the Commissioner of Agriculture and Public Works, with in Quebec, the Speaker of the Legislative Council and the Solicitor General.

64. [Executive Government of Nova Scotia and New Brunswick.] The Constitution of the Executive Authority in each of the Provinces of Nova Scotia and New Brunswick shall, subject to the Provisions of this Act, continue as it exists at the Union until altered under the Authority of this Act.

65. [Powers to be exercised by Lieutenant Governor of Ontario or Quebec with Advice, or alone.] All Powers, Authorities, and Functions which under any Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of Upper Canada, Lower Canada, or Canada, were or are before or at the Union vested in or exerciseable by the respective Governors or Lieutenant Governors of those Provinces, with the Advice or with the Advice and Consent of the respective Executive Councils thereof, or in

conjunction with those Councils, or with any Number of Members thereof, or by those Governors or Lieutenant Governors individually, shall, as far as the same are capable of being exercised after the Union in relation to the Government of Ontario and Quebec respectively, be vested in and shall or may be exercised by the Lieutenant Governor of Ontario and Quebec respectively, with the Advice or with the Advice and Consent of or in conjunction with the respective Executive Councils, or any Members thereof, or by the Lieutenant Governor individually, as the Case requires, subject nevertheless (except with respect to such as exist under Acts of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland,) to be abolished or altered by the respective Legislatures of Ontario and Quebec.

66. [Application of provisions referring to Lieutenant Governor in Council.] The Provisions of this Act referring to the Lieutenant Governor in Council shall be construed as referring to the Lieutenant Governor of the Province acting by and with the Advice of the Executive Council thereof.

67. [Administration in Absence, &c. of Lieutenant Governor.] The Governor General in Council may from Time to Time appoint an Administrator to execute the Office and Functions of Lieutenant Governor during his Absence, Illness, or other Inability.

68. [Seats of Provincial Governments.] Unless and until the Executive Government of any Province otherwise directs with respect to that Province, the Seats of Government of the Provinces shall be as follows, namely,--of Ontario, the City of Toronto; of Quebec, the City of Quebec; of Nova Scotia, the City of Halifax; and of New Brunswick, the City of Fredericton.

Legislative Power.

1.--ONTARIO.

69. [Legislature for Ontario.] There shall be a Legislature for Ontario consisting of the Lieutenant Governor and of One House, styled the Legislative Assembly of Ontario.

70. [Electoral districts.] The Legislative Assembly of Ontario shall be composed of Eighty-two Members, to be elected to represent the Eighty-two Electoral Districts set forth in the First Schedule to this Act.

2.--QUEBEC.

71. [Legislature for Quebec.] There shall be a Legislature for Quebec consisting of the Lieutenant Governor and of Two Houses, styled the Legislative Council of Quebec and the Legislative Assembly of Quebec.

72. [Constitution of Legislative Council.] The Legislative Council of Quebec shall be composed of Twenty-four Members, to be appointed by the Lieutenant Governor in the Queen's Name, by Instrument under the Great Seal of Quebec, one being appointed to represent each of the Twenty-four Electoral Divisions of

Lower Canada in this Act referred to, and each holding Office for the Term of his Life, unless the Legislature of Quebec otherwise provides under the Provisions of this Act.

73. [Qualification of Legislative Councillors.] The Qualifications of the Legislative Councillors of Quebec shall be the same as those of the Senators for Quebec.

74. [Resignation, Disqualification, &c.] The Place of a Legislative Councillor of Quebec shall become vacant in the Cases, mutatis mutandis, in which the Place of Senator becomes vacant.

75. [Vacancies.] When a Vacancy happens in the Legislative Council of Quebec by Resignation, Death, or otherwise, the Lieutenant Governor, in the Queen's Name, by Instrument under the Great Seal of Quebec, shall appoint a fit and qualified Person to fill the Vacancy.

76. [Questions as to Vacancies, &c.] If any Question arises respecting the Qualification of a Legislative Councillor of Quebec, or a Vacancy in the Legislative Council of Quebec, the same shall be heard and determined by the Legislative Council.

77. [Speaker of Legislative Council.] The Lieutenant Governor may from Time to Time, by Instrument under the Great Seal of Quebec, appoint a Member of the Legislative Council of Quebec to be Speaker thereof, and may remove him and appoint another in his Stead.

78. [Quorum of Legislative Council.] Until the Legislature of Quebec otherwise provides, the Presence of at least Ten Members of the Legislative Council, including the Speaker, shall be necessary to constitute a Meeting for the Exercise of its Powers.

79. [Voting in Legislative Council.] Questions arising in the Legislative Council of Quebec shall be decided by a Majority of Voices, and the Speaker shall in all Cases have a Vote, and when the Voices are equal the Decision shall be deemed to be in the negative.

80. [Constitution of Legislative Assembly of Quebec.] The Legislative Assembly of Quebec shall be composed of Sixty-five Members, to be elected to represent the Sixty-five Electoral Divisions or Districts of Lower Canada in this Act referred to, subject to Alteration thereof by the Legislature of Quebec: Provided that it shall not be lawful to present to the Lieutenant Governor of Quebec for Assent any Bill for altering the Limits of any of the Electoral Divisions or Districts mentioned in the Second Schedule to this Act, unless the Second and Third Readings of such Bill have been passed in the Legislative Assembly with the Concurrence of the Majority of the Members representing all those Electoral Divisions or Districts, and the Assent shall not be given to such Bill unless an Address has been presented by the Legislative Assembly to the Lieutenant Governor stating that it has been so passed.

3.--ONTARIO AND QUEBEC.

81. [First Session of Legislatures.] The Legislatures of Ontario and Quebec respectively shall be called together not later than Six Months after the Union.

82. [Summoning of Legislative Assemblies.] The Lieutenant Governor of Ontario and of Quebec shall from Time to Time, in the Queen's Name, by Instrument under the Great Seal of the Province, summon and call together the Legislative Assembly of the Province.

83. [Restriction on election of holders of offices.] Until the Legislature of Ontario or of Quebec otherwise provides, a Person accepting or holding in Ontario or in Quebec any Office, Commission, or Employment, permanent or temporary, at the Nomination of the Lieutenant Governor, to which an annual Salary, or any Fee, Allowance, Emolument, or profit of any Kind or Amount whatever from the Province is attached, shall not be eligible as a Member of the Legislative Assembly of the respective Province, nor shall he sit or vote as such; but nothing in this Section shall make ineligible any Person being a Member of the Executive Council of the respective Province, or holding any of the following Offices, that is to say, the Offices of Attorney General, Secretary and Registrar of the Province, Treasurer of the Province, Commissioner of Crown Lands, and Commissioner of Agriculture and Public Works, and in Quebec Solicitor General, or shall disqualify him to sit or vote in the House for which he is elected, provided he is elected while holding such Office.

84. [Continuance of existing Election Laws.] Until the Legislatures of Ontario and Quebec respectively otherwise provide, all Laws which at the Union are in force in those Provinces respectively, relative to the following Matters, or any of them, namely,--the Qualifications and Disqualifications of Persons to be elected or to sit or vote as Members of the Assembly of Canada, the Qualifications or Disqualifications of Voters, the Oaths to be taken by Voters, the Returning Officers, their Powers and Duties, the Proceedings at Elections, the Periods during which such Elections may be continued, and the Trial of controverted Elections and the Proceedings incident thereto, the vacating of the Seats of Members and the issuing and execution of new Writs in case of Seats vacated otherwise than by Dissolution,--shall respectively apply to Elections of Members to serve in the respective Legislative Assemblies of Ontario and Quebec.

Provided that until the Legislature of Ontario otherwise provides, at any Election for a Member of the Legislative Assembly of Ontario for the District of Algoma, in addition to Persons qualified by the Law of the Province of Canada to vote, every male British Subject, aged Twenty-one Years or upwards, being a Householder, shall have a Vote.

85. [Duration of Legislative Assemblies.] Every Legislative Assembly of Ontario and every Legislative Assembly of Quebec shall continue for Four Years from the Day of the Return of the Writs for choosing the same (subject nevertheless to either the Legislative Assembly of Ontario or the Legislative Assembly of Quebec being sooner dissolved by the Lieutenant Governor of the Province), and no longer.

86. [Yearly Session of Legislature.] There shall be a session of the Legislature of Ontario and of that of Quebec once at least in every Year, so that Twelve Months shall not intervene between the last Sitting of the Legislature in each Province in one Session and its first Sitting in the next Session.

87. [Speaker, Quorum, &c.] The following Provisions of this Act respecting the House of Commons of Canada shall extend and apply to the Legislative Assemblies of Ontario and Quebec, that is to say,--the Provisions relating to the Election of a Speaker originally and on Vacancies, the Duties of the Speaker, the Absence of the Speaker, the Quorum, and the Mode of voting, as if those Provisions were here re-enacted and made applicable in Terms to each such Legislative Assembly.

4.--NOVA SCOTIA AND NEW BRUNSWICK.

88. [Constitutions of Legislatures of Nova Scotia and New Brunswick.] The Constitution of the Legislature of each of the Provinces of Nova Scotia and New Brunswick shall, subject to the Provisions of this Act, continue as it exists at the Union until altered under the Authority of this Act; and the House of Assembly of New Brunswick existing at the passing of this Act shall, unless sooner dissolved, continue for the Period for which it was elected.

5.--ONTARIO, QUEBEC AND NOVA SCOTIA.

89. [First Elections.] Each of the Lieutenant Governors of Ontario, Quebec and Nova Scotia shall cause Writs to be issued for the First Election of Members of the Legislative Assembly thereof in such Form and by such Person as he thinks fit, and at such Time and addressed to such Returning Officer as the Governor General directs, and so that the First Election of Member of Assembly for any Electoral District or any Subdivision thereof shall be held at the same Time and at the same Places as the Election for a Member to serve in the House of Commons of Canada for that Electoral District.

6.--THE FOUR PROVINCES.

90. [Application to Legislatures of Provisions respecting Money Votes, &c.] The following Provisions of this Act respecting the Parliament of Canada, namely,--the Provisions relating to Appropriation and Tax Bills, the Recommendation of Money Votes, the Assent to Bills, the Disallowance of Acts, and the Signification of Pleasure on Bills reserved,--shall extend and apply to the Legislatures of the several Provinces as if those Provisions were here re-enacted and made applicable in Terms to the respective Provinces and the Legislatures thereof, with the Substitution of the Lieutenant Governor of the Province for the Governor General, of the Governor General for the Queen and for a Secretary of State, of One Year for Two Years, and of the Province for Canada.

VI.--DISTRIBUTION OF LEGISLATIVE POWERS.

Powers of the Parliament.

91. [Legislative Authority of Parliament of Canada.] It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,--

1. The Public Debt and Property.

2. The Regulation of Trade and Commerce.

3. The raising of Money by any Mode or System of Taxation.

4. The borrowing of Money on the Public Credit.

5. Postal Service.

6. The Census and Statistics.

7. Militia, Military and Naval Service, and Defence.

8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.

9. Beacons, Buoys, Lighthouses, and Sable Island.

10. Navigation and Shipping.

11. Quarantine and the Establishment and Maintenance of Marine Hospitals.

12. Sea Coast and Inland Fisheries.

13. Ferries between a Province and any British or Foreign Country or between Two Provinces.

14. Currency and Coinage.

15. Banking, Incorporation of Banks, and the Issue of Paper Money.

16. Savings Banks.

17. Weights and Measures.

18. Bills of Exchange and Promissory Notes.

19. Interest.

20. Legal Tender.

21. Bankruptcy and Insolvency.

22. Patents of Invention and Discovery.

23. Copyrights.

24. Indians, and Lands reserved for the Indians.

25. Naturalization and Aliens.

26. Marriage and Divorce.

27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

28. The Establishment, Maintenance, and Management of Penitentiaries.

29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

Exclusive Powers of Provincial Legislatures.

92. [Subjects of exclusive Provincial Legislation.] In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated, that is to say,--

1. The Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of Lieutenant Governor.

2. Direct Taxation within the Province in order to the raising of Revenue for Provincial Purposes.

3. The borrowing of Money on the sole Credit of the Province.

4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.

5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.

6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.

7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.

8. Municipal Institutions in the Province.

9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.

10. Local Works and Undertakings other than such as are of the following Classes,--

a. Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:

b. Lines of Steam Ships between the Province and any British or Foreign Country:

c. Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

11. The Incorporation of Companies with Provincial Objects.

12. The Solemnization of Marriage in the Province.

13. Property and Civil Rights in the Province.

14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.

16. Generally all Matters of a merely local or private Nature in the Province.

Education.

93. [Legislation respecting Education.] In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:--

(1.) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union:

(2.) All the Powers, Privileges, and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall be and the same are hereby extended to the Dissentient Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec:

(3.) Where in any Province a System of Separate or Dissentient Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education:

(4.) In case any such Provincial Law as from Time to Time seems to the Governor General in Council requisite for the due Execution of the Provisions of this Section is not made, or in case any Decision of the Governor General in Council on any Appeal under this Section is not duly executed by the proper Provincial Authority in that Behalf, then and in every such Case, and as far only as the Circumstances of each Case require, the Parliament of Canada may make remedial Laws for the due Execution of the Provisions of this Section and of any Decision of the Governor General in Council under this Section.

Uniformity of Laws in Ontario, Nova Scotia, and New Brunswick.

94. [Legislation for Uniformity of Laws in three Provinces.] Notwithstanding anything in this Act, the Parliament of Canada may make Provision for the Uniformity of all or any of the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and of the Procedure of all or any of the Courts in those Three Provinces, and from and after the passing of any Act in that Behalf the Power of the Parliament of Canada to make Laws in relation to any Matter comprised in any such Act shall, notwithstanding anything in this Act, be unrestricted; but any Act of the Parliament of Canada making Provision for such Uniformity shall not have effect in any Province unless and until it is adopted and enacted as Law by the Legislature thereof.

Agriculture and Immigration.

95. [Concurrent Powers of Legislation respecting Agriculture, &c.] In each Province the Legislature may make Laws in relation to Agriculture in the Province, and to Immigration into the Province; and it is hereby declared that the Parliament of Canada may from Time to Time make Laws in relation to Agriculture in all or any of the Provinces, and to Immigration into all or any of the

Provinces; and any Law of the Legislature of a Province relative to Agriculture or to Immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada.

VII.--JUDICATURE.

96. [Appointment of Judges.] The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

97. [Selection of Judges in Ontario, &c.] Until the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and the Procedure of the Courts in those Provinces, are made uniform, the Judges of the Courts of those Provinces appointed by the Governor General shall be selected from the respective Bars of those Provinces.

98. [Selection of Judges in Quebec.] The Judges of the Courts of Quebec shall be selected from the Bar of that Province.

99. [Tenure of Office of Judges of Superior Courts.] The Judges of the Superior Courts shall hold office during good Behaviour, but shall be removable by the Governor General on Address of the Senate and House of Commons.

100. [Salaries, &c., of Judges.] The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada.

101. [General Court of Appeal, &c.] The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time, provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.

VIII.--REVENUES; DEBTS; ASSETS; TAXATION.

102. [Creation of Consolidated Revenue Fund.] All Duties and Revenues over which the respective Legislatures of Canada, Nova Scotia, and New Brunswick before and at the Union had and have Power of Appropriation, except such Portions thereof as are by this Act reserved to the respective Legislatures of the Provinces, or are raised by them in accordance with the special Powers conferred on them by this Act, shall form One Consolidated Revenue Fund, to be appropriated for the Public Service of Canada in the Manner and subject to the Charges in this Act provided.

103. [Expenses of Collection, &c.] The Consolidated Revenue Fund of Canada shall be permanently charged with the Costs, Charges, and Expenses incident to the Collection, Management, and Receipt thereof, and the same shall form the First Charge thereon, subject to be reviewed and audited in such

Manner as shall be ordered by the Governor General in Council until the Parliament otherwise provides.

104. [Interest of Provincial Public Debts.] The annual Interest of the Public Debts of the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union shall form the Second Charge on the Consolidated Revenue Fund of Canada.

105. [Salary of Governor General.] Unless altered by the Parliament of Canada, the salary of the Governor General shall be Ten thousand Pounds Sterling Money of the United Kingdom of Great Britain and Ireland, payable out of the Consolidated Revenue Fund of Canada, and the same shall form the Third Charge thereon.

106. [Appropriation from time to time.] Subject to the several Payments by this Act charged on the Consolidated Revenue Fund of Canada, the same shall be appropriated by the Parliament of Canada for the Public Service.

107. [Transfer of Stocks, &c.] All Stocks, Cash, Banker's Balances, and Securities for Money belonging to each Province at the time of the Union, except as in this Act mentioned, shall be the Property of Canada, and shall be taken in Reduction of the Amount of the respective Debts of the Provinces at the Union.

108. [Transfer of Property in Schedule.] The Public Works and Property of each Province, enumerated in the Third Schedule to this Act, shall be the Property of Canada.

109. [Property in Lands, Mines, &c.] All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.

110. [Assets connected with Provincial Debts.] All Assets connected with such Portions of the Public Debt of each Province as are assumed by that Province shall belong to that Province.

111. [Canada to be liable for Provincial Debts.] Canada shall be liable for the Debts and Liabilities of each Province existing at the Union.

112. [Debts of Ontario and Quebec.] Ontario and Quebec conjointly shall be liable to Canada for the Amount (if any) by which the Debt of the Province of Canada exceeds at the Union Sixty-two million five hundred thousand Dollars, and shall be charged with Interest at the Rate of Five per Centum per Annum thereon.

113. [Assets of Ontario and Quebec.] The Assets enumerated in the Fourth Schedule to this Act belonging at the Union to the Province of Canada shall be the Property of Ontario and Quebec conjointly.

114. [Debt of Nova Scotia.] Nova Scotia shall be liable to Canada for the Amount (if any) by which its Public Debt exceeds at the Union Eight million Dollars, and shall be charged with Interest at the Rate of Five per Centum per Annum thereon.

115. [Debt of New Brunswick.] New Brunswick shall be liable to Canada for the Amount (if any) by which its Public Debt exceeds at the Union Seven million Dollars, and shall be charged with Interest at the Rate of Five per Centum per Annum thereon.

116. [Payment of Interest to Nova Scotia and New Brunswick.] In case the Public Debts of Nova Scotia and New Brunswick do not at the Union amount to Eight million and Seven million Dollars respectively, they shall respectively receive by half-yearly Payments in advance from the Government of Canada Interest at Five per Centum per Annum on the Difference between the actual Amounts of their respective Debts and such stipulated Amounts.

117. [Provincial Public Property.] The several Provinces shall retain all their respective Public Property not otherwise disposed of in this Act, subject to the Right of Canada to assume any Lands or Public Property required for Fortifications or for the Defence of the Country.

118. [Grants to Provinces.] The following Sums shall be paid yearly by Canada to the several Provinces for the Support of their Governments and Legislatures:

	Dollars
Ontario	Eighty thousand
Quebec	Seventy thousand
Nova Scotia	Sixty thousand
New Brunswick	Fifty thousand
	Two hundred and sixty thousand

and an annual Grant in aid of each Province shall be made, equal to Eighty Cents per Head of the Population as ascertained by the Census of One thousand eight hundred and sixty-one, and in the Case of Nova Scotia and New Brunswick, by each subsequent Decennial Census until the Population of each of those Two Provinces amounts to Four hundred thousand Souls, at which Rate such Grant shall thereafter remain. Such Grants shall be in full Settlement of all future Demands on Canada, and shall be paid half-yearly in advance to each Province; but the Government of Canada shall deduct from such Grants, as against any Province, all Sums chargeable as Interest on the Public Debt of that Province in excess of the several Amounts stipulated in this Act.

119. [Further Grant to New Brunswick.] New Brunswick shall receive by half-yearly Payments in advance from Canada for the Period of Ten Years from the Union an additional Allowance of Sixty-three thousand Dollars per Annum; but as long as the Public Debt of that Province remains under Seven million Dollars, a Deduction equal to the Interest at Five per Centum per Annum on such Deficiency shall be made from that Allowance of Sixty-three thousand Dollars.

120. [Form of Payments.] All Payments to be made under this Act, or in discharge of Liabilities created under any Act of the Provinces of Canada, Nova Scotia, and New Brunswick respectively, and assumed by Canada, shall, until the Parliament of Canada otherwise directs, be made in such Form and Manner as may from Time to Time be ordered by the Governor General in Council.

121. [Canadian Manufactures, &c.] All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.

122. [Continuance of customs and excise Laws.] The Customs and Excise Laws of each Province shall, subject to the Provisions of this Act, continue in force until altered by the Parliament of Canada.

123. [Exportation and Importation as between Two Provinces.] Where Customs Duties are, at the Union, leviable on any Goods, Wares, or Merchandises in any Two Provinces, those Goods, Wares, and Merchandises may, from and after the Union, be imported from one of those Provinces into the other of them on Proof of Payment of the Customs Duty leviable thereon in the Province of Exportation, and on Payment of such further Amount (if any) of Customs Duty as is leviable thereon in the Province of Importation.

124. [Lumber Dues in New Brunswick.] Nothing in this Act shall affect the Right of New Brunswick to levy the Lumber Dues provided in Chapter Fifteen of Title Three of the Revised Statutes of New Brunswick, or in any Act amending that Act before or after the Union, and not increasing the Amount of such Dues; but the Lumber of any of the Provinces other than New Brunswick shall not be subject to such Dues.

125. [Exemption of Public Lands, &c.] No Lands or Property belonging to Canada or any Province shall be liable to Taxation.

126. [Provincial Consolidated Revenue Fund.] Such Portions of the Duties and Revenues over which the respective Legislatures of Canada, Nova Scotia, and New Brunswick had before the Union Power of Appropriation as are by this Act reserved to the respective Governments or Legislatures of the Provinces, and all Duties and Revenues raised by them in accordance with the special Powers conferred upon them by this Act, shall in each Province form One Consolidated Revenue Fund to be appropriated for the Public Service of the Province.

IX.--MISCELLANEOUS PROVISIONS.

General

127. [As to Legislative Councillors of Provinces becoming senators.] If any Person being at the passing of this Act a Member of the Legislative Council of Canada, Nova Scotia, or New Brunswick, to whom a Place in the Senate is offered, does not within Thirty Days thereafter, by Writing under his Hand addressed to the Governor General of the Province of Canada or to the Lieutenant Governor of Nova Scotia or New Brunswick (as the Case may be), accept the same, he shall be deemed to have declined the same; and any Person who, being at the passing of this Act a Member of the Legislative Council of Nova Scotia or New Brunswick, accepts a Place in the Senate shall thereby vacate his Seat in such Legislative Council.

128. [Oath of Allegiance, &c.] Every Member of the Senate or House of Commons of Canada shall before taking his Seat therein take and subscribe before the Governor General or some Person authorized by him, and every Member of a Legislative Council or Legislative Assembly of any Province shall before taking his Seat therein take and subscribe before the Lieutenant Governor of the Province or some Person authorized by him, the Oath of Allegiance contained in the Fifth Schedule to this Act; and every Member of the Senate of Canada and every Member of the Legislative Council of Quebec shall also, before taking his Seat therein, take and subscribe before the Governor General, or some Person authorized by him, the Declaration of Qualification contained in the same Schedule.

129. [Continuance of existing Laws, Courts, Officers, &c.] Except as otherwise provided by this Act, all Laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and all Courts of Civil and Criminal Jurisdiction, and all legal Commissions, Powers, and Authorities, and all Officers, Judicial, Administrative, and Ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland,) to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the Authority of the Parliament or of that Legislature under this Act.

130. [Transfer of Officers to Canada.] Until the Parliament of Canada otherwise provides, all Officers of the several Provinces having Duties to discharge in relation to Matters other than those coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces shall be Officers of Canada, and shall continue to discharge the Duties of their respective Offices under the same Liabilities, Responsibilities, and Penalties as if the Union had not been made.

131. [Appointment of new Officers.] Until the Parliament of Canada otherwise provides, the Governor General in Council may from Time to Time appoint such Officers as the Governor General in Council deems necessary or proper for the effectual Execution of this Act.

132. [Treaty Obligations.] The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries arising under Treaties between the Empire and such Foreign Countries.

133. [Use of English and French Languages.] Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.

The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those Languages.

Ontario and Quebec.

134. [Appointment of executive officers for Ontario and Quebec.] Until the Legislature of Ontario or of Quebec otherwise provides, the Lieutenant Governors of Ontario and Quebec may each appoint under the Great Seal of the Province the following Officers, to hold Office during Pleasure, that is to say,--the Attorney General, the Secretary and Registrar of the Province, the Treasurer of the Province, the Commissioner of Crown Lands, and the Commissioner of Agriculture and Public Works, and in the Case of Quebec the Solicitor General, and may, by Order of the Lieutenant Governor in Council, from Time to Time prescribe the Duties of those Officers and of the several Departments over which they shall preside or to which they shall belong, and of the Officers and Clerks thereof; and may also appoint other and additional Officers to hold Office during Pleasure, and may from Time to Time prescribe the Duties of those Officers, and of the several Departments over which they shall preside or to which they shall belong, and of the Officers and Clerks thereof.

135. [Powers, duties, &c., of Executive officers.] Until the Legislature of Ontario or Quebec otherwise provides, all Rights, Powers, Duties, Functions, Responsibilities, or Authorities at the passing of this Act vested in or imposed on the Attorney General, Solicitor General, Secretary and Registrar of the Province of Canada, Minister of Finance, Commissioner of Crown Lands, Commissioner of Public Works, and Minister of Agriculture and Receiver General, by any Law, Statute or Ordinance of Upper Canada, Lower Canada, or Canada, and not repugnant to this Act, shall be vested in or imposed on any Officer to be appointed by the Lieutenant Governor for the Discharge of the same or any of them; and the Commissioner of Agriculture and Public Works shall perform the Duties and Functions of the Office of Minister of Agriculture at the passing of this Act imposed by the Law of the Province of Canada, as well as those of the Commissioner of Public Works.

136. [Great Seals.] Until altered by the Lieutenant Governor in Council, the Great Seals of Ontario and Quebec respectively shall be the same, or of the

same Design, as those used in the Provinces of Upper Canada and Lower Canada respectively before their Union as the Province of Canada.

137. [Construction of temporary Acts.] The Words "and from thence to the End of the then next ensuing Session of the Legislature," or Words to the same Effect, used in any temporary Act of the Province of Canada not expired before the Union, shall be construed to extend and apply to the next Session of the Parliament of Canada if the Subject Matter of the Act is within the Powers of the same, as defined by this Act, or to the next Sessions of the Legislatures of Ontario and Quebec respectively, if the Subject Matter of the Act is within the Powers of the same as defined by this Act.

138. [As to Errors in Names.] From and after the Union the Use of the Words "Upper Canada" instead of "Ontario," or "Lower Canada" instead of "Quebec," in any Deed, Writ, Process, Pleading, Document, Matter, or Thing, shall not invalidate the same.

139. [As to Issue of Proclamations before Union, to commence after Union.] Any Proclamation under the Great Seal of the Province of Canada issued before the Union to take effect at a Time which is subsequent to the Union, whether relating to that Province, or to Upper Canada, or to Lower Canada, and the several Matters and Things therein proclaimed shall be and continue of like Force and Effect as if the Union had not been made.

140. [As to Issue of Proclamations after Union.] Any Proclamation which is authorized by any Act of the Legislature of the Province of Canada to be issued under the Great Seal of the Province of Canada, whether relating to that Province, or to Upper Canada, or to Lower Canada, and which is not issued before the Union, may be issued by the Lieutenant Governor of Ontario or of Quebec, as its Subject Matter requires, under the Great Seal thereof; and from and after the Issue of such Proclamation the same and the several Matters and Things therein proclaimed shall be and continue of the like Force and Effect in Ontario or Quebec as if the Union had not been made.

141. [Penitentiary.] The Penitentiary of the Province of Canada shall, until the Parliament of Canada otherwise provides, be and continue the Penitentiary of Ontario and of Quebec.

142. [Arbitration respecting Debts, &c.] The Division and Adjustment of the Debts, Credits, Liabilities, Properties, and Assets of Upper Canada and Lower Canada shall be referred to the Arbitrament of Three Arbitrators, One chosen by the Government of Ontario, One by the Government of Quebec, and One by the Government of Canada; and the Selection of the Arbitrators shall not be made until the Parliament of Canada and the Legislatures of Ontario and Quebec have met; and the Arbitrator chosen by the Government of Canada shall not be a Resident either in Ontario or in Quebec.

143. [Division of Records.] The Governor General in Council may from Time to Time order that such and so many of the Records, Books, and Documents of the Province of Canada as he thinks fit shall be appropriated and

delivered either to Ontario or to Quebec, and the same shall thenceforth be the Property of that Province; and any Copy thereof or Extract therefrom, duly certified by the Officer having charge of the Original thereof, shall be admitted as Evidence.

144. [Constitution of Townships in Quebec.] The Lieutenant Governor of Quebec may from Time to Time, by Proclamation under the Great Seal of the Province, to take effect from a Day to be appointed therein, constitute Townships in those Parts of the Province of Quebec in which Townships are not then already constituted, and fix the Metes and Bounds thereof.

X.--INTERCOLONIAL RAILWAY.

145. [Duty of Government and Parliament of Canada to make Railway herein described.] Inasmuch as the Provinces of Canada, Nova Scotia, and New Brunswick have joined in a Declaration that the Construction of the Intercolonial Railway is essential to the Consolidation of the Union of British North America, and to the Assent thereto of Nova Scotia and New Brunswick, and have consequently agreed that Provision should be made for its immediate Construction by the Government of Canada: Therefore, in order to give effect to that Agreement, it shall be the Duty of the Government and Parliament of Canada to provide for the Commencement within Six Months after the Union, of a Railway connecting the River St. Lawrence with the City of Halifax in Nova Scotia, and for the Construction thereof without Intermission, and the Completion thereof with all practicable Speed.

XI.--ADMISSION OF OTHER COLONIES.

146. [Power to admit Newfoundland, &c., into the Union.] It shall be lawful for the Queen, by and with the Advice of Her Majesty's Most Honourable Privy Council, on Addresses from the Houses of the Parliament of Canada, and from the Houses of the respective Legislatures of the Colonies or Provinces of Newfoundland, Prince Edward Island, and British Columbia, to admit those Colonies or Provinces, or any of them, into the Union, and on Address from the Houses of the Parliament of Canada to admit Rupert's Land and the North-western Territory, or either of them, into the Union, on such Terms and Conditions in each Case as are in the Addresses expressed and as the Queen thinks fit to approve, subject to the Provisions of this Act; and the Provisions of any Order in Council in that Behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland.

147. [As to Representation of Newfoundland and Prince Edward Island in Senate.] In case of the Admission of Newfoundland and Prince Edward Island, or either of them, each shall be entitled to a Representation in the Senate of Canada of Four Members, and (notwithstanding anything in this Act) in case of the Admission of Newfoundland the normal Number of Senators shall be Seventy-six and their maximum Number shall be Eighty-two; but Prince Edward Island when admitted shall be deemed to be comprised in the third of the Three Divisions into which Canada is, in relation to the Constitution of the Senate, divided by this Act, and accordingly, after the Admission of Prince Edward Island, whether

Newfoundland is admitted or not, the Representation of Nova Scotia and New Brunswick in the Senate shall, as Vacancies occur, be reduced from Twelve to Ten Members respectively, and the Representation of each of those Provinces shall not be increased at any Time beyond Ten, except under the Provisions of this Act for the Appointment of Three or Six additional Senators under the Direction of the Queen.

THE THIRD SCHEDULE.

Provincial Public Works and Property to be the Property of Canada.

1. Canals, with Lands and Water Power connected therewith.

2. Public Harbours.

3. Lighthouses and Piers, and Sable Island.

4. Steamboats, Dredges, and Public Vessels.

5. Rivers and Lake Improvements.

6. Railways and Railway Stocks, Mortgages, and other Debts due by Railway Companies.

7. Military Roads.

8. Custom Houses, Post Offices, and all other Public Buildings, except such as the Government of Canada appropriate for the Use of the Provincial Legislatures and Governments.

9. Property transferred by the Imperial Government, and known as Ordnance Property.

10. Armouries, Drill Sheds, Military Clothing, and Munitions of War, and Lands set apart for general Public Purposes.

II. *Colonial Laws Validity Act, 1865*, 28 & 29 Victoria c. 63 (UK)

Colonial Laws Validity Act, 1865

An Act to remove Doubts as to the Validity of Colonial Laws

28 & 29 Vict., c. 63 (U.K.)

[*29th June 1865*]

Whereas Doubts have been entertained respecting the Validity of divers laws enacted or purporting to have been enacted by the Legislatures of certain of Her Majesty's Colonies and respecting the Powers of such Legislatures and it is expedient that such Doubts should be removed:

Be it hereby enacted by the Queen's most Excellent Majesty by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled and by the Authority of the same as follows:

1. The Term "*Colony*" shall in this Act include all of Her Majesty 's Possessions abroad in which there shall exist a Legislature as hereinafter defined except the Channel Islands the Isle of Man and such Territories as may for the Time being be vested in Her Majesty under or by virtue of any Act of Parliament for the Government of India

The Terms "*Legislature*" and "*Colonial Legislature*" shall severally signify the Authority other than the Imperial Parliament or Her Majesty in Council competent to make Laws for any Colony:

The Term "*Representative Legislature*" shall signify any Colonial Legislature which shall comprise a Legislative Body of which One Half are elected by Inhabitants of the Colony:

The Term "*Colonial Law*" shall include Laws made for any Colony either by such Legislature as aforesaid or by Her Majesty in Council:

An Act of Parliament or any Provision thereof; shall in construing this Act be said to extend to any Colony when it is made applicable to such Colony by the express Words or necessary Intendment of any Act of Parliament:

The Term "*Governor*" shall mean the Officer lawfully administering he Government of any Colony:

The Term "*Letters Patent*" shall mean Letters Patent under the Great Seal of the United Kingdom of Great Britain and Ireland

2. Any Colonial Law which is or shall be in any respect repugnant to the Provisions of any Act of Parliament extending to the Colony to which such Law may relate, or repugnant to any Order or Regulation made under Authority of such Act of Parliament, or having in the Colony the Force and Effect of SUCII Act, shall be read subject to such Act, Order, or Regulation, and shall, to the Extent of such Repugnancy, but not otherwise, be and remain absolutely void and inoperative.

3. No Colonial Law shall be or be deemed to have been void or inoperative on the Ground of Repugnancy to the Law of England, unless the same shall be repugnant to the Provisions of some such Act of Parliament, Order, or Regulation as aforesaid.

4. No Colonial Law, passed with the Concurrence of or assented to by the Governor of any Colony, or to be hereafter so passed or assented to, shall be or be deemed to have been void or inoperative by reason only of any Instructions with reference to such Law or the Subject thereof which may have been given to such Governor by or on behalf of Her Majesty, by any Instrument other than the Letters Patent or Instrument authorizing such Governor to concur in passing or to assent to Laws for the Peace, Order, and good Government of such Colony, even though such Instructions may be referred to in such Letters Patent or last-mentioned Instrument.

5. Every Colonial Legislature shall have, and be deemed at all Times to have had full Power within its Jurisdiction to establish Courts of Judicature, and to abolish and reconstitute the same, and to alter the Constitution thereof, and to make Provision for the Administration of Justice therein; and every Representative Legislature shall, in respect to the Colony under its Jurisdiction, have, and be deemed to at all Times to have had, full Power to make Laws respecting the Constitution, Powers, and Procedure of such Legislature; provided that such Laws shall have been passed in such Manner and Form as may from Time to Time be required by any Act of Parliament, Letters Patent, Order in Council, or Colonial Law for the Time being in force in the said Colony.

6. The Certificate of the Clerk or other proper Officer of a Legislative Body in any Colony to the Effect that the Document to which it is attached is a true Copy of any Colonial Law assented to by the Governor of such Colony, or of any Bill reserved for the Signification of Her Majesty's Pleasure by the said Governor. shall be prima facie Evidence that the Document so certified is a true Copy of such Law or Bill, and, as the Case may be, that such Law has been duly and properly passed and assented to, or that such Bill has been duly and properly passed and presented to the Governor; and any Proclamation purporting to be published by Authority of the Governor in any Newspaper in the Colony to which such Law or Bill shall relate, and signifying Her Majesty 's Disallowance of any such Colonial Law, or Her Majesty's Assent to any such reserved Bill as aforesaid, shall be prima facie Evidence of such Disallowance or Assent.

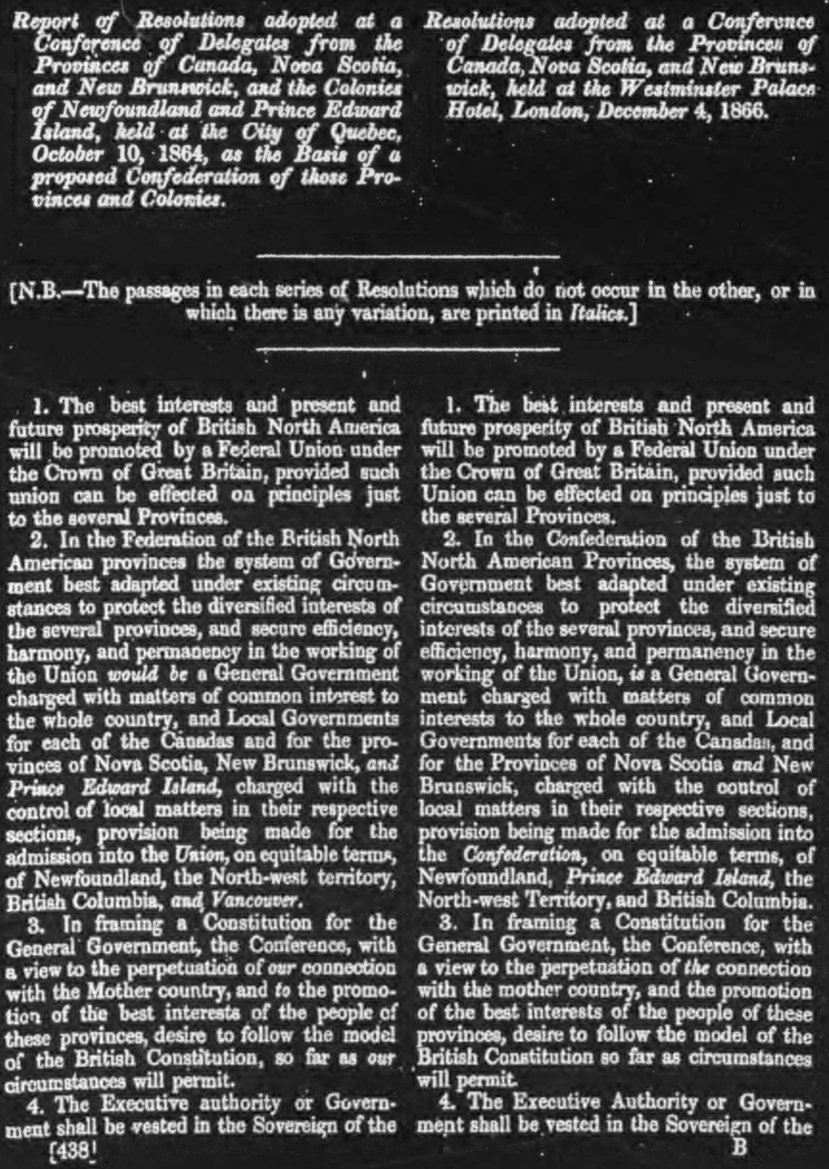
"And whereas Doubts are entertained respecting the Validity of certain Acts enacted or reputed to be enacted by the Legislature of South Australia:" Be it further enacted as follows:

7. All Laws or reputed Laws enacted or purporting to have been enacted by the said Legislature, or by Persons or Bodies of Persons for the Time being acting as such Legislature, which have received the Assent of Her Majesty in Council, or which have received the Assent of the Governor of the said Colony in the Name and on behalf of Her Majesty, shall be and be deemed to have been valid and effectual from the Date of such Assent for all Purposes whatever; provided that nothing herein contained shall be deemed to give Effect to any Law or reputed Law which has been disallowed by Her Majesty, or has expired, or has been lawfully repealed, or to prevent the lawful Disallowance or Repeal of any Law.

Appendix B

I. The *Quebec Resolutions* and the *London Resolutions* in comparison

From Early Canadiana On-line, accessed 2003-11-03
<http://www.canadiana.org/ECO/ItemRecord/9_01325?id=0b4a1c5d62cffde7>



Report of Resolutions adopted at a Conference of Delegates from the Provinces of Canada, Nova Scotia, and New Brunswick, and the Colonies of Newfoundland and Prince Edward Island, held at the City of Quebec, October 10, 1864, as the Basis of a proposed Confederation of those Provinces and Colonies.	*Resolutions adopted at a Conference of Delegates from the Provinces of Canada, Nova Scotia, and New Brunswick, held at the Westminster Palace Hotel, London, December 4, 1866.*
1. The best interests and present and future prosperity of British North America will be promoted by a Federal Union under the Crown of Great Britain, provided such union can be effected on principles just to the several Provinces.	1. The best interests and present and future prosperity of British North America will be promoted by a Federal Union under the Crown of Great Britain, provided such Union can be effected on principles just to the several Provinces.
2. In the Federation of the British North American provinces the system of Government best adapted under existing circumstances to protect the diversified interests of the several provinces, and secure efficiency, harmony, and permanency in the working of the Union *would be* a General Government charged with matters of common interest to the whole country, and Local Governments for each of the Canadas and for the provinces of Nova Scotia, New Brunswick, *and Prince Edward Island,* charged with the control of local matters in their respective sections, provision being made for the admission into the *Union,* on equitable terms, of Newfoundland, the North-west territory, British Columbia, *and Vancouver.*	2. In the *Confederation* of the British North American Provinces, the system of Government best adapted under existing circumstances to protect the diversified interests of the several provinces, and secure efficiency, harmony, and permanency in the working of the Union, *is* a General Government charged with matters of common interests to the whole country, and Local Governments for each of the Canadas, and for the Provinces of Nova Scotia *and* New Brunswick, charged with the control of local matters in their respective sections, provision being made for the admission into the *Confederation,* on equitable terms, of Newfoundland, *Prince Edward Island,* the North-west Territory, and British Columbia.
3. In framing a Constitution for the General Government, the Conference, with a view to the perpetuation of *our* connection with the Mother country, and *to* the promotion of the best interests of the people of these provinces, desire to follow the model of the British Constitution, so far as *our* circumstances will permit.	3. In framing a Constitution for the General Government, the Conference, with a view to the perpetuation of *the* connection with the mother country, and the promotion of the best interests of the people of these provinces, desire to follow the model of the British Constitution so far as circumstances will permit.
4. The Executive authority or Government shall be vested in the Sovereign of the	4. The Executive Authority or Government shall be vested in the Sovereign of the

[N.B.—The passages in each series of Resolutions which do not occur in the other, or in which there is any variation, are printed in *Italics.*]

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B

United Kingdom of Great Britain and Ireland, and be administered, according to the well-understood principles of the British Constitution, by the Sovereign personally or by the Representative of the Sovereign duly authorized.	United Kingdom of Great Britain and Ireland, and be administered according to the well-understood principles of the British Constitution, by the Sovereign personally, or by the Representative of the Sovereign duly authorized.
5. The Sovereign, *or Representative of the Sovereign*, shall be Commander-in-chief of the Land and Naval Militia Forces.	5. The Sovereign shall be Commander-in-Chief of the Land and Naval Militia Forces.
6. There shall be a General Legislature or Parliament for the *Federated Provinces*, composed of a Legislative Council and a House of Commons.	6. There shall be a General Legislature or Parliament for the *Confederation*, composed of the Sovereign, a Legislative Council, and a House of Commons.
7. For the purpose of forming the Legislative Council, the *Federated Provinces* shall be considered as consisting of three divisions:—1st, Upper Canada; 2nd, Lower Canada; 3rd, Nova Scotia, New Brunswick, *and Prince Edward Island;* each division with an equal representation in the Legislative Council.	7. For the purpose of forming the Legislative Council, the *Confederation* shall be considered as consisting of three divisions:—1st, Upper Canada; 2nd, Lower Canada; *and* 3rd, Nova Scotia and New Brunswick; each division with an equal representation in the Legislative Council.
8. Upper Canada shall be represented in the Legislative Council by 24 members, Lower Canada by 24 members, and the *three* Maritime Provinces by 24 members, of which Nova Scotia shall have *10*, New Brunswick *10*, *and Prince Edward Island 4 members.*	8. Upper Canada shall be represented in the Legislative Council by 24 members; Lower Canada by 24 members; and the Maritime Provinces by 24 members, of which Nova Scotia shall have *12*, *and* New Brunswick 12 members.
	9. *The Colony of Prince Edward Island when admitted into the Confederation shall be entitled to a representation of 4 members in the Legislative Council. But in such case the members allotted to Nova Scotia and New Brunswick shall be diminished to 10 each, such diminution to take place in each Province as vacancies occur.*
9. The Colony of Newfoundland *shall be entitled to enter the proposed Union, with a representation in the Legislative Council of 4 members.*	10. The Colony of Newfoundland, when admitted into the Confederation, shall be entitled to a representation in the Legislative Council of 4 members.
10. The North-west Territory, British Columbia, *and Vancouver* shall be admitted into the Union on such terms and conditions as the Parliament of the *Federated Provinces* shall deem equitable, and as shall receive the assent of *Her Majesty;* and in the case of the Province of British Columbia *or Vancouver*, as shall be agreed to by the Legislature of such Province.	11. The North-west Territory and British Columbia shall be admitted into the Union on such terms and conditions as the Parliament of the *Confederation* shall deem equitable, and as shall receive the assent of *the Sovereign;* and in case of the Province of British Columbia, as shall be agreed to by the Legislature of such Province.
11. The Members of the Legislative Council shall be appointed by the Crown under the Great Seal of the General Government, and shall hold office during life. If any Legislative Councillor shall, for two consecutive sessions of Parliament, fail to give his attendance in the said Council, his seat shall thereby become vacant.	12. The Members of the Legislative Council shall be appointed by the Crown under the Great Seal of the General Government, *from among residents of the Province for which they are severally appointed*, and shall hold office during life. If any Legislative Councillor shall for two consecutive Sessions of Parliament fail to give his attendance in the said Council, his seat shall thereby become vacant.
12. The Members of the Legislative Council shall be British subjects by birth or naturalization, of the full age of 30 years, shall possess a continuous real property qualification of 4,000 dollars over and above all incumbrances, and shall be and continue	13. The Members of the Legislative Council shall be British subjects by birth or naturalization, of the full age of 30 years, shall *each* possess *in the Province for which they are appointed*, a continuous real property qualification of 4,000 dollars, over and

worth that sum over and above their debts and liabilities, *but in the case of Newfoundland and Prince Edward Island the property may be either real or personal.*	above all incumbrances, and shall be and continue worth that sum over and above their debts and liabilities. *and shall possess a continuous residence in the Province for which they are appointed, except in the case of persons holding positions which require their attendance at the seat of Government pending their tenure of office.*
13. If any question shall arise as to the qualification of a Legislative Councillor, the same shall be determined by *the* Council.	14. If any question shall arise as to the qualification of a Legislative Councillor, the same shall be determined by the *Legislative* Council.
14. *The first selection of the members of the Legislative Council shall be made, except as regards Prince Edward Island, from the Legislative Councils of the various provinces, so far as a sufficient number be found qualified and willing to serve. Such members shall be appointed by the Crown at the recommendation of the General Executive Government, upon the nomination of the respective Local Governments; and in such nomination due regard shall be had to the claims of the members of the Legislative Council of the Opposition in each province, so that all political parties may as nearly as possible be fairly represented.*	15. *The members of the Legislative Council for the Confederation shall in the first instance be appointed upon the nomination of the Executive Governments of Canada, Nova Scotia and New Brunswick respectively, and the number allotted to each Province shall be nominated from the Legislative Councils of the different Provinces, due regard being had to the fair representation of both political parties; but in case any member of the Local Council, so nominated, shall decline to accept it, it shall be competent for the Executive Government in any Province to nominate in his place a person who is not a member of the Local Council.*
15. The Speaker of the Legislative Council (unless otherwise provided by Parliament) shall be appointed by the Crown from among the members of the Legislative Council, and shall hold office during pleasure, and shall only be entitled to a casting vote on an equality of votes.	16. The Speaker of the Legislative Council (unless otherwise provided by Parliament) shall be appointed by the Crown from among the members of the Legislative Council, and shall hold office during pleasure, and shall only be entitled to a casting vote on an equality of votes.
16. Each of the twenty-four Legislative Councillors representing Lower Canada in the Legislative Council of the General Legislature shall be appointed to represent one of the twenty-four electoral divisions mentioned in Schedule A of Chapter 1 of the Consolidated Statutes of Canada, and such Councillor shall reside or possess his qualification in the division he is appointed to represent.	17. Each of the twenty-four Legislative Councillors, representing Lower Canada, in the Legislative Council of the General Legislature shall be appointed to represent one of the twenty-four Electoral Divisions mentioned in Schedule A of Chapter 1 of the Consolidated Statutes of Canada, and such Councillor shall reside or possess his qualification in the Division he is appointed to represent.
17. The basis of the representation in the House of Commons shall be population, as determined by the official census every 10 years; and the number of Members at first shall be *194*, distributed as follows: Upper Canada .. .. 82 Lower Canada .. .. 65 Nova Scotia.. .. .. 19 New Brunswick .. .. 15 *Newfoundland* .. .. *8* *Prince Edward Island* .. *5*	18. The basis of representation in the House of Commons shall be population, as determined by the official census every ten years, and the number of Members, at first, shall be *181*, distributed as follows:— Upper Canada .. .. 82 Lower Canada .. .. 65 Nova Scotia .. .. 19 New Brunswick 15
18. Until the official census of 1871 has been made up, there shall be no change in the number of Representatives from the several sections.	19. Until *the first general election after* the official census of 1871 has been made up there shall be no change in the number of representatives from the several sections.
19. Immediately after the completion of the census of 1871, and immediately after every decennial census thereafter, the repre-	20. Immediately after the completion of the census of 1871, and immediately after every decennial census thereafter, the repre-

sentation from *each section* in the House of Commons shall be re-adjusted on the basis of population.

20. For the purpose of such re-adjustments, Lower Canada shall always be assigned 65 members, and each of the other *sections* shall at each re-adjustment receive, for the ten years then next succeeding, the number of members to which it will be entitled on the same ratio of representation to population as Lower Canada will enjoy according to the census last taken by having 65 members.

21. No reduction shall be made in the number of members returned by any *section*, unless its population shall have decreased relatively to the population of the whole Union, to the extent of 5 per centum.

22. In computing at each decennial period the number of members to which each *section* is entitled, no fractional parts shall be considered, unless when exceeding one-half the number entitling to a member, in which case a member shall be given for each such fractional part.

23. *The Legislature of each province shall divide such province into the proper number of constituencies, and define the boundaries of each of them.*

24. *The local Legislature of each province may, from time to time, alter the electoral districts for the purposes of representation in the House of Commons, and distribute the Representatives to which the province is entitled, in any manner such Legislature may think fit.*

25. The number of members may at any time be increased by the General Parliament, regard being had to the proportionate rights then existing.

26. Until provisions are made by the General Parliament, all the laws which at the date of the Proclamation constituting the Union are in force in the Provinces respectively, relating to the qualification and disqualification of any person to be elected or to sit or vote as a member of the Assembly in the said Provinces respectively; and relating to the qualification or disqualification of voters, and to the oaths to be taken by voters, and to returning officers and their powers and duties; and relating to the proceedings at elections, and to the period during which such elections may be continued; and relating to the trial of controverted elections, and the proceedings incident thereto; and relating to the vacating of seats of members, and the issuing and execution of new writs in case of any seat being vacated otherwise than by a dissolution, shall respectively apply to elections

sentation from each *Province* in the House of Commons shall be re-adjusted on the basis of population, *such re-adjustment to take effect upon the termination of the then existing Parliament.*

21. For the purpose of such re-adjustments, Lower Canada shall always be assigned 65 Members, and each of the other *Provinces* shall, at each re-adjustment, receive for the ten years then next succeeding the number of Members to which it will be entitled on the same ratio of representation to population as Lower Canada will enjoy according to the census *then* last taken by having 65 Members.

22. No reduction shall be made in the number of Members returned by any *Province* unless its population shall have decreased relatively to the population of the whole Union, to the extent of 5 per centum.

23. In computing at each decennial period the number of Members to which each *province* is entitled, no fractional parts shall be considered, unless when exceeding one-half the number entitling to a Member, in which case a Member shall be given for each such fractional part.

24. The number of Members may at any time be increased by the General Parliament, regard being had to the proportionate rights then existing.

25. Until provisions are made by the General Parliament, all the laws which at the date of the Proclamation constituting the Union are in force in the Provinces respectively, relating to the qualification and disqualification of any person to be elected, or to sit or vote as a Member of the Assembly in the said Provinces respectively; and relating to the qualification or disqualification of voters, and to the oaths to be taken by voters, and to returning officers and their powers and duties; and relating to the proceedings at elections and to the period during which such elections may be continued; and relating to the trial of controverted elections and the proceedings incident thereto; and relating to the vacating of seats of members and to the issuing and execution of new writs in case of any seat being vacated otherwise than by a dissolution, shall respectively apply to elections of members to

of members to serve in the House of Commons, for places situate in those provinces respectively.	serve in the House of Commons, for places situate in those Provinces respectively.
27. Every House of Commons shall continue for five years from the day of the return of the writs choosing the same, and no longer; subject, nevertheless, to be sooner prorogued or dissolved by the Governor.	26. Every House of Commons shall continue for five years from the day of the return of the writs choosing the same, and no longer; subject nevertheless, to be sooner prorogued or dissolved by the Governor-*General*.
28. There shall be a Session of the General Parliament once at least in every year, so that a period of twelve calendar months shall not intervene between the last sitting of the General Parliament in one session and the first sitting thereof in the next session.	27. There shall be a Session of the General Parliament once at least in every year, so that a period of twelve calendar months shall not intervene between the last sitting of the General Parliament in one Session and the first sitting thereof in the next Session.
29. The General Parliament shall have power to make laws for the peace, welfare, and good government of the *Federated Provinces* (saving the sovereignty of England), and especially laws respecting the following subjects :—	28. The General Parliament shall have power to make laws for the peace, welfare, and good government of the *Confederation* (saving the sovereignty of England), and especially laws respecting to the following subjects :—
1. The public debt and property.	1. The public debt and property.
2. The regulation of trade and commerce.	2. The regulation of trade and commerce.
3. *The imposition or regulation of duties of Customs on imports and exports, except on exports of timber, logs, masts, spars, deals, and sawn lumber, and of coal and other minerals.*	
4. *The imposition and regulation of Excise duties.*	
5. The raising of money by all or any other modes or systems of taxation.	3. *The raising of money by all or any mode or system of taxation.*
6. The borrowing of money on the public credit.	4. The borrowing of money on the public credit.
7. Postal service.	5. Postal service.
8. Lines of steam or other ships, railways, canals, and other works, connecting any two or more of the Provinces together, or extending beyond the limits of any Province.	6. Lines of steam or other ships, railways, canals, and other works connecting any two or more of the Provinces, together or extending beyond the limits of any Province.
9. Lines of steam-ships between the Federated Provinces and other countries.	7. Lines of steam-ships between the Confederated Provinces and other countries.
10. Telegraphic communication and the incorporation of Telegraph Companies.	8. Telegraphic communication and the incorporation of Telegraph Companies.
11. All such works as shall, although lying wholly within any Province, be specially declared by the Acts authorizing them to be for the general advantage.	9. All such works as shall, although lying wholly lying within any Province, be specially declared by the Acts authorizing them to be for the general advantage.
12. The census.	10. The census *and statistics*.
13. Militia, military and naval service and defence.	11. Militia, military and naval service and defence.
14. Beacons, buoys, and lighthouses.	12. Beacons, buoys, lighthouses, *and Sable Island*.
15. Navigation and shipping.	13. Navigation and shipping.
16. Quarantine.	14. Quarantine.
17. Sea-coast and inland fisheries.	15. Sea coast and inland fisheries.
18. Ferries between any Province and a	16. Ferries between any province and

foreign country, or between any two Provinces.	a foreign country, or between any two provinces.
19. Currency and coinage.	17. Currency and coinage.
20. Banking, incorporation of banks, and the issue of paper money.	18. Banking, incorporation of banks, and the issue of paper money.
21. Savings banks.	19. Savings banks.
22. Weights and measures.	20. Weights and measures.
23. Bills of exchange and promissory notes.	21. Bills of exchange and promissory notes.
24. Interest.	22. Interest.
25. Legal tender.	23. Legal tender.
26. Bankruptcy and insolvency.	24. Bankruptcy and insolvency.
27. Patents of invention and discovery.	25. Patents of invention and discovery.
28. Copyrights.	26. Copyrights.
29. Indians and lands reserved for the Indians.	27. Indians, and lands reserved for the Indians.
30. Naturalization and aliens.	28. Naturalization and aliens.
31. Marriage and divorce.	29. Marriage and divorce.
32. The criminal law, excepting the constitution of Courts of Criminal Jurisdiction, but including the procedure in criminal matters.	30. The criminal law, excepting the constitution of Courts of Criminal Jurisdiction, but including the procedure in criminal matters.
	31. *The establishment, maintenance and management of penitentiaries.*
33. Rendering uniform all or any of the laws relative to property and civil rights in Upper Canada, Nova Scotia, New Brunswick, Newfoundland, and Prince Edward Island, and rendering uniform the procedure of all or any of the Courts in these provinces: but any statute for this purpose shall have no force or authority in any province until sanctioned by the Legislature thereof.	32. Rendering uniform all or any of the laws relative to property and civil rights in Upper Canada, Nova Scotia, and New Brunswick, and rendering uniform the procedure of all or any of the Courts in these Provinces; but any statute for this purpose shall have no force or authority in any Province until sanctioned by the Legislature thereof; *and the power of repealing, amending, or altering such laws shall thenceforward remain with the General Parliament only.*
34. The establishment of a General Court of Appeal for the *Federated Provinces.*	33. The establishment of a General Court of Appeal for the *Confederation.*
35. Immigration.	34. Immigration.
36. Agriculture.	35. Agriculture.
37. And generally respecting all matters of a general character, not specially and exclusively reserved for the Local Government and Legislatures.	36. And generally respecting all matters of a general character not specially and exclusively reserved for the Local Legislature.
30. The General Government and Parliament shall have all powers necessary or proper for performing the obligations of the *Federated Provinces,* as part of the British Empire, to foreign countries, arising under Treaties between Great Britain and such countries.	29. The General Government and Parliament shall have all powers necessary or proper for performing the obligations of the *Confederation,* as part of the British Empire, to foreign countries arising under Treaties between Great Britain and such countries.
	30. *The powers and privileges of the House of Commons of the United Kingdom of Great Britain and Ireland shall be held to appertain to the House of Commons of the Confederation, and the powers and privileges appertaining to the House of Lords in its Legislative capacity shall be held to appertain to the Legislative Council.*
31. The General Parliament may also,	31. The General Parliament may from

from time to time, establish additional Courts, and the General Government may appoint Judges and Officers thereof, when the same shall appear necessary or for the public advantage, in order to the due execution of the laws of Parliament.	time to time establish additional Courts, and the General Government may appoint Judges and Officers thereof, when the same shall appear necessary or for the public advantage, in order to the due execution of the laws of *such* Parliament.
32. All Courts, Judges and Officers of the several provinces shall aid, assist, and obey the General Government in the exercise of its rights and powers, and for such purposes shall be held to be Courts, Judges, and Officers of the General Government.	32. All Courts, Judges, and Officers of the several Provinces shall aid, assist, and obey the General Government in the exercise of its rights and powers, and for such purposes shall be held to be Courts, Judges, and Officers of the General Government.
33. The General Government shall appoint and pay the Judges of the Superior Courts in each province, and of the *County Courts of Upper Canada*, and Parliament shall fix their salaries.	33. The General Government shall appoint and pay *the salaries of* the Judges of the Superior *and District and County* Courts in each Province, and Parliament shall fix their salaries.
34. Until the consolidation of the laws of Upper Canada, New Brunswick, Nova Scotia, *Newfoundland, and Prince Eward Island*, the Judges of these provinces appointed by the General Government shall be selected from their respective Bars.	34. Until the consolidation of the laws of Upper Canada, Nova Scotia, and New Brunswick, the Judges of these Provinces appointed by the General Government shall be selected from their respective Bars.
35. The Judges of the Courts of Lower Canada shall be selected from the Bar of Lower Canada.	35. The Judges of the Courts of Lower Canada shall be selected from the Bar of Lower Canada.
36. The Judges of the Court of Admiralty *now receiving salaries* shall be paid by the General Government.	36. The Judges of the Court of Admiralty shall be paid by the General Government.
37. The Judges of the Superior Courts shall hold their offices during good behaviour, and shall be removable *only* on the Address of both Houses of Parliament.	37. The Judges of the Superior Courts shall hold their offices during good behaviour, and shall be removable on the Address of both Houses of Parliament.

Local Government.

38. For each of the provinces there shall be an Executive officer, styled the *Lieutenant*-Governor, who shall be appointed by the Governor-General in Council, under the Great Seal of the *Federated Provinces*, during pleasure: such pleasure not to be exercised before the expiration of the first five years, except for cause: such cause to be communicated in writing to the *Lieutenant*-Governor immediately after the exercise of the pleasure as aforesaid, and also by Messages to both Houses of Parliament, within the first week of the first session afterwards.	38. For each of the Provinces there shall be an Executive officer styled the Governor, who shall be appointed by the Governor-General in Council, under the Great Seal of the *Confederation*, during pleasure; such pleasure not to be exercised before the expiration of the first five years except for cause, such cause to be communicated in writing to the Governor immediately after the exercise of the pleasure as aforesaid, and also by message to both Houses of Parliament within the first week of the first session afterwards, *but the appointment of the first Governors shall be provisional and they shall hold office strictly during pleasure.*
39. The *Lieutenant*-Governor of each Province shall be paid by the General Government.	39. The Governor of each Province shall be paid by the General Government.
40. *In undertaking to pay the salaries of the Lieutenant-Governors, the Conference does not desire to prejudice the claim of Prince Edward Island upon the Imperial Goverment for the amount now paid for the salary of the Lieutenant-Governor thereof.*	
41. The Local Government and Legislature of each Province shall be constructed in such manner as the *existing* Legislature of *such* Province shall provide.	40. The Local Government and Legislature of each Province shall be constructed in such manner as the Legislature of each such Province shall provide.

42. *The Local Legislatures shall have power to alter or amend their Constitution from time to time.* [See Col. 2, par. 41 (1).]	
43. The Local Legislatures shall have power to make laws respecting the following subjects:	41. The Local Legislatures shall have power to make laws respecting the following subjects:—
	1. *The altering or amending their Constitution from time to time.* [See Col. 1, par. 42.]
1. Direct taxation, *and the imposition of duties on the export of timber, logs, masts, spars, deals, and sawn lumber, and of coals and other minerals.*	2. Direct taxation, *and in the case of New Brunswick the right of levying timber dues by the mode and to the extent now established by law, provided such timber be not the produce of the other Provinces.*
2. Borrowing money on the credit of the Province.	3. Borrowing money on the credit of the Province.
3. The establishment and tenure of local offices, and the appointment and payment of local officres.	4. The establishment and tenure of Local Offices, and the appointment and payment of Local Officers.
4. Agriculture.	5. Agriculture.
5. Immigration.	6. Immigration.
6. Education; saving the rights and privileges which the Protestant or Catholic minority in both Canadas may *possess* as to *their* denominational schools, at the time when the Union goes into operation.	7. Education, saving the rights and privileges which the Protestant or Catholic minority in any Province may *have by law* as to denominational schools at the time when the Union goes into operation. *And in any Province where a system of separate or dissentient schools by law obtains, or where the Local Legislation may hereafter adopt a system of separate or dissentient schools, an appeal shall lie to the Governor-General in Council of the General Government from the acts and decisions of the Local authorities, which may affect the rights or privileges of the Protestant or Catholic minority in the matter of Education. And the General Parliament shall have power in the last resort to legislate on the subject.*
7. The sale and management of public lands, excepting lands belonging to the General Government.	8. The sale and management of public lands, excepting lands belonging to the General Government.
8. *Sea-coast and inland fisheries.*	
9. The establishment, maintenance, and management *of penitentiaries and* of public and reformatory prisons.	9. The establishment, maintenance and management of public and reformatory prisons.
10. The establishment, maintenance, and management of hospitals, asylums, charities, and eleemosynary institutions.	10. The establishment, maintenance, and management of hospitals, asylums, charities, and eleemosynary institutions, *except marine hospitals.*
11. Municipal institutions.	11. Municipal institutions.
12. Shop, saloon, tavern, auctioneer, and other licences.	12. Shop, saloon, tavern, auctioneer, and other licences, *for local revenue.*
13. Local works.	13. Local works.
14. The incorporation of private or local Companies, except such as relate to matters assigned to the General Parliament.	14. The incorporation of private or local Companies, except such as relate to matters assigned to the General Parliament.

15. Property and civil rights, excepting *those* portions thereof assigned to the General Parliament.	15. Property and civil rights (*including the solemnization of marriage*), excepting portions thereof assigned to the General Parliament.
16. Inflicting punishment by fine, penalties, imprisonment or otherwise for the breach of laws passed in relation to any subject within their jurisdiction.	16. Inflicting punishment by fine, penalties, imprisonment, or otherwise, for the breach of laws passed in relation to any subject within their jurisdiction.
17. The administration of justice, including the constitution, maintenance, and organization of the Courts, both of civil and criminal jurisdiction, and including also the procedure in civil matters.	17. The administration of justice, including the constitution, maintenance, and organization of the Courts, both of civil and criminal jurisdiction, and including also the the procedure in civil matters.
18. And generally all matters of a private or local nature, not assigned to the General Parliament.	18. And generally all matters of a private or local nature not assigned to the General Parliament.
	42. *All the powers, privileges, and duties conferred and imposed upon Catholic Separate Schools and School Trustees in Upper Canada shall be extended to the Protestant and Catholic Dissentient Schools in Lower Canada.*
44. The power of respiting, reprieving, and pardoning prisoners convicted of crimes, and of commuting and remitting of sentences in whole or in part, which belongs of right to the Crown, shall be administered by the *Lieutenant*-Governor of each province in Council, subject to any instructions he may from time to time receive from the General Government, and subject to any provisions that may be made in this behalf by the General Parliament.	43. The power of respiting, reprieving, and pardoning prisoners convicted of crimes, and of commuting and remitting of sentences, in whole or in part, which belongs of right to the Crown, shall, *except in capital cases*, be administered by the Governor of each Province in Council, subject to any instructions he may from time to time receive from the General Government, and subject to any provisions that may be made in this behalf by the General Parliament.
Miscellaneous.	
45. In regard to all subjects over which jurisdiction belongs to both the General and Local Legislatures, the laws of the General Parliament shall control and supersede those made by the Local Legislature, and the latter shall be void so far as they are repugnant to or inconsistent with the former.	44. In regard to all subjects over which jurisdiction belongs to both the General and Local Legislatures, the laws of the General Parliament shall control and supersede those made by the Local Legislature, and the latter shall be void so far as they are repugnant to or inconsistent with the former.
46. Both the English and French languages may be employed in the General Parliament and in its proceedings, and in the Local Legislature of Lower Canada, and also in the Federal Courts and in the Courts of Lower Canada.	45. Both the English and French languages may be employed in the General Parliament, and in its proceedings, and in the Local Legislature of Lower Canada, and also in the Federal Courts, and in the Courts of Lower Canada.
47. No lands or property belonging to the General or Local Government shall be liable to taxation.	46. No lands or property belonging to the General or Local Government shall be liable to taxation.
48. All Bills for appropriating any part of the public revenue, or for imposing any *new* tax or impost, shall originate in the House of Commons or the House of Assembly, as case may be.	47. All Bills for appropriating any part of the public revenue, or for imposing any tax or impost, shall originate in the House of Commons or House of Assembly, as the case may be.
9. The House of Commons or House of mbly shall not originate or pass any , resolution, address, or bill for the propriation of any part of the public enue, or of any tax or impost to any	48. The House of Commons or House of Assembly shall not originate or pass any vote, resolution, address or bill for the appropriation of any part of the public revenue, or of any tax or impost, to any purpose, not

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purpose, not first recommended by Message of the Governor-General, or the *Lieutenant-Governor*, as the case may be, during the session in which such vote, resolution, address, or bill is passed.	first recommended by Message of the Governor-General or the Governor, as the case may be, during the Session in which such vote, resolution, address or bill is passed.
50. Any Bill of the General Parliament may be reserved in the usual manner for Her Majesty's assent, and any Bill of the Local Legislatures may in like manner be reserved for the consideration of the Governor-General.	49. Any Bill of the General Parliament may be reserved in the usual manner for Her Majesty's assent, and any Bill of the Local Legislatures may, in like manner, be reserved for the consideration of the Governor-General.
51. Any Bill passed by the General Parliament shall be subject to disallowance by Her Majesty within two years, as in the case of Bills passed by the Legislatures of the said Provinces hitherto, and in like manner any Bill passed by a Local Legislature shall be subject to disallowance by the Governor-General within one year after the passing thereof.	50. Any Bill passed by the General Parliament shall be subject to disallowance by Her Majesty within two years, as in the case of Bills passed by the Legislatures of the said Provinces hitherto; and in like manner any Bill passed by a Local Legislature shall be subject to disallowance by the Governor-General within one year after the passing thereof.
52. The seat of Government of the *Federated Provinces* shall be Ottawa, subject to the Royal Prerogative.	51. The seat of Government of the *Confederation* shall be Ottawa, subject to the Royal Prerogative.
53. Subject to any future action of the respective Local Governments, the seat of the Local Government in Upper Canada shall be Toronto; of Lower Canada, Quebec; and the seats of the Local Governments in the other Provinces shall be as at present.	52. Subject to any future action of the respective Local Governments, the seat of the Local Governments in Upper Canada shall be Toronto; of Lower Canada, Quebec; and the seats of the local Governments in the other Provinces shall be as at present.

Property and Liabilities.

54. All stocks, cash, bankers' balances and securities for money belonging to each Province, at the time of the Union, except as hereinafter mentioned, shall belong to the General Government.	53. All stocks, cash, bankers' balances and securities for money belonging to each Province at the time of the Union, except as hereinafter mentioned, shall belong to the General Government.
55. The following public works and property of each Province shall belong to the General Government, to wit:—	54. The following public works and property of each Province shall belong to the General Government, to wit:—
1. Canals.	1. Canals.
2. Public harbours.	2. Public harbours.
3. Lighthouses and piers.	3. Lighthouses and piers, *and Sable Island.*
4. Steam-boats, dredges, and public vessels.	4. Steam-boats, dredges, and public vessels.
5. River and lake improvements.	5. Rivers and lake improvements.
6. Railway and railway stocks, mortgages, and other debts due by railway companies.	6. Railways and railway stocks, mortgages, and other debts due by railway companies.
7. Military roads.	7. Military roads.
8. Custom-houses, post-offices, and other public buildings, except such as may be set aside by the General Government for the use of the Local Legislatures and Governments.	8. Custom-houses, post offices, and *all* other public buildings, except such as may be set aside by the General Government for the use of the Local Legislatures and Governments.
9. Property transferred by the Imperial Government, and known as Ordnance property.	9. Property transferred by the Imperial Government and known as ordnance property.
10. Armouries, drill-sheds, military clothing, and munitions of war; and	10. Armouries, drill-sheds, military clothing, and munitions of war; and lands set apart for general public purposes.
11. Lands set apart for public purposes.	

56. All lands, mines, minerals, and royalties vested in Her Majesty in the Provinces of Upper Canada, Lower Canada, Nova Scotia, New Brunswick, *and Prince Edward Island*, for the use of such Provinces, shall belong to the Local Government of the territory in which the same are so situate, subject to any trusts that may exist in respect to any of such lands or to any interest of other persons in respect of the same.

57. All sums due from purchasers or lessees of such lands, mines, or minerals at the time of the Union shall also belong to the Local Governments.

58. All assets connected with such portions of the public debt of any province as are assumed by the Local Governments shall also belong to those Governments respectively.

59. The several provinces shall retain all other public property therein, subject to the right of the General Government to assume any lands or public property required for fortifications or the defence of the country.

60. The General Government shall assume *all* the debts and liabilities of each Province.

61. The debt of Canada not specially assumed by Upper and Lower Canada respectively shall not exceed at the time of the Union.. ..	$62,500,000
Nova Scotia shall enter the Union with a debt not exceeding.. ..	8,000,000
And New Brunswick with a debt not exceeding..	7,000,000

62. In case Nova Scotia or New Brunswick *do not incur liabilities beyond those for which their Governments are now bound, and which shall make their debts at the date of Union less than 8,000,000 and 7,000,000 dollars respectively, they shall be entitled* to interest at 5 per cent. on *the amount not so incurred, in like manner as is hereinafter provided for Newfoundland and Prince Edward Island; the foregoing resolution being in no respect intended to limit the powers given to the respective Governments of those Provinces by legislative authority, but only to limit the maximum amount of charge to be assumed by the General Government. Provided always, that the powers so conferred by the respective Legislatures shall be exercised within five years from this date, or the same shall then lapse.*

63. *Newfoundland and Prince Edward Island, not having incurred debts equal to to those of the other provinces, shall be entitled to receive by half-yearly payments in*

55. All lands, mines, minerals, and royalties vested in Her Majesty in the Provinces of Upper Canada, Lower Canada, Nova Scotia, and New Brunswick, for the use of such Provinces, shall belong to the Local Government of the territory in which the same are so situate, subject to any trusts that may exist in respect to any of such lands, or to any interest of other persons in respect of the same.

56. All sums due from purchasers or lessees of such lands, mines, or minerals at the time of the Union shall also belong to the Local Government.

57. All assets connected with such portions of the public debt of any Province as are assumed by the Local Governments shall also belong to those Governments respectively.

58. The several Provinces shall retain all other public property therein, subject to the right of the General Government to assume any lands or public property required for fortifications or the defence of the country.

59. The General Government shall assume the debts and liabilities of each Province.

60. The debt of Canada, not specially assumed by Upper and Lower Canada respectively shall not exceed at the time of the Union 62,500,000 dollars, Nova Scotia shall enter the Union with a debt not exceeding 8,000,000 dollars, and New Brunswick with a debt not exceeding 7,000,000 dollars. *But this stipulation is in no respect intended to limit the powers given to the respective Governments of those Provinces by legislative authority, but only to determine the maximum amount of charge to be assumed by the General Government.*

61. In case Nova Scotia or New Brunswick *should not have contracted debts at the date of union equal to the amount with which they are respectively entitled to enter the Confederation, they shall receive by half-yearly payment, in advance from the General Government the interest at 5 per cent. on the difference between the actual amount of their respective debts and such stipulated amounts.*

E

advance from the General Government the interest at 5 per cent. on the difference between the actual amount of their respective debts at the time of the Union and the average amount of indebtedness per head of the population of Canada, Nova Scotia, and New Brunswick.

64. In consideration of the transfer to the General Parliament of the powers of taxation, an annual grant in aid of each province shall be made, equal to 80 cents per head of the population, as established by the census of 1861, *the population of Newfoundland being estimated at 130,000. Such aid shall be in full settlement of all future demands upon the General Government for local purposes, and shall be paid half-yearly in advance to each province.*

65. The position of New Brunswick being such as to entail large immediate charges upon her local revenues, it is agreed that for the period of ten years from the time when the Union takes effect an additional allowance of 63,000 dollars per annum shall be made to that province. But that so long as the liability of that province remains under 7,000,000 dollars, a deduction equal to the interest on such deficiency shall be made from the 63,000 dollars.

66. *In consideration of the surrender to the General Government by Newfoundland of all its rights in mines and minerals, and of all the ungranted and unoccupied lands of the Crown, it is agreed that the sum of 150,000 dollars each year be paid to that Province, by semi-annual payments. Provided that that Colony shall retain the right of opening, constructing, and controlling roads and bridges through any of the said lands, subject to any laws which the General Parliament may pass in respect of the same.*

67. All engagements that may, before the Union, be entered into with the Imperial Government for the defence of the country shall be assumed by the General Government.

62. In consideration of the transfer to the General Parliament of the powers of taxation, *the following sums shall be paid by the General Government to each Province for the support of their Local Governments and Legislatures:—*

		$
Upper Canada ..	..	*80,000*
Lower Canada ..	..	*70,000*
Nova Scotia ..	..	*60,000*
New Brunswick ..	..	*50,000*
		260,000

And an annual grant in aid of each Province shall be made equal to 80 cents per head of the population, as established by the Census of 1861, *and in the case of Nova Scotia and New Brunswick by each subsequent decennial census, until the population of each of those Provinces shall amount to 400,000 souls, at which rate it shall thereafter remain. Such aid shall be in full settlement of all future demands upon the General Government for local purposes, and shall be paid half-yearly in advance to each Province; but the General Government shall deduct from such subsidy all sums paid as interest on the public debt of any Province in excess of the amount provided under the 60th Resolution.*

63. The position of New Brunswick being such as to entail large immediate charges upon her local revenues, it is agreed that for the period of ten years from the time when the Union takes effect an additional allowance of 63,000 dollars per annum shall be made to that Province: but that so long as the liability of that Province remains under 7,000,000 dollars, a deduction equal to the interest on such deficiency shall be made from the 63,000 dollars.

64. All engagements that may before the Union be entered into with the Imperial Government for the defence of the country shall be assumed by the General Government.

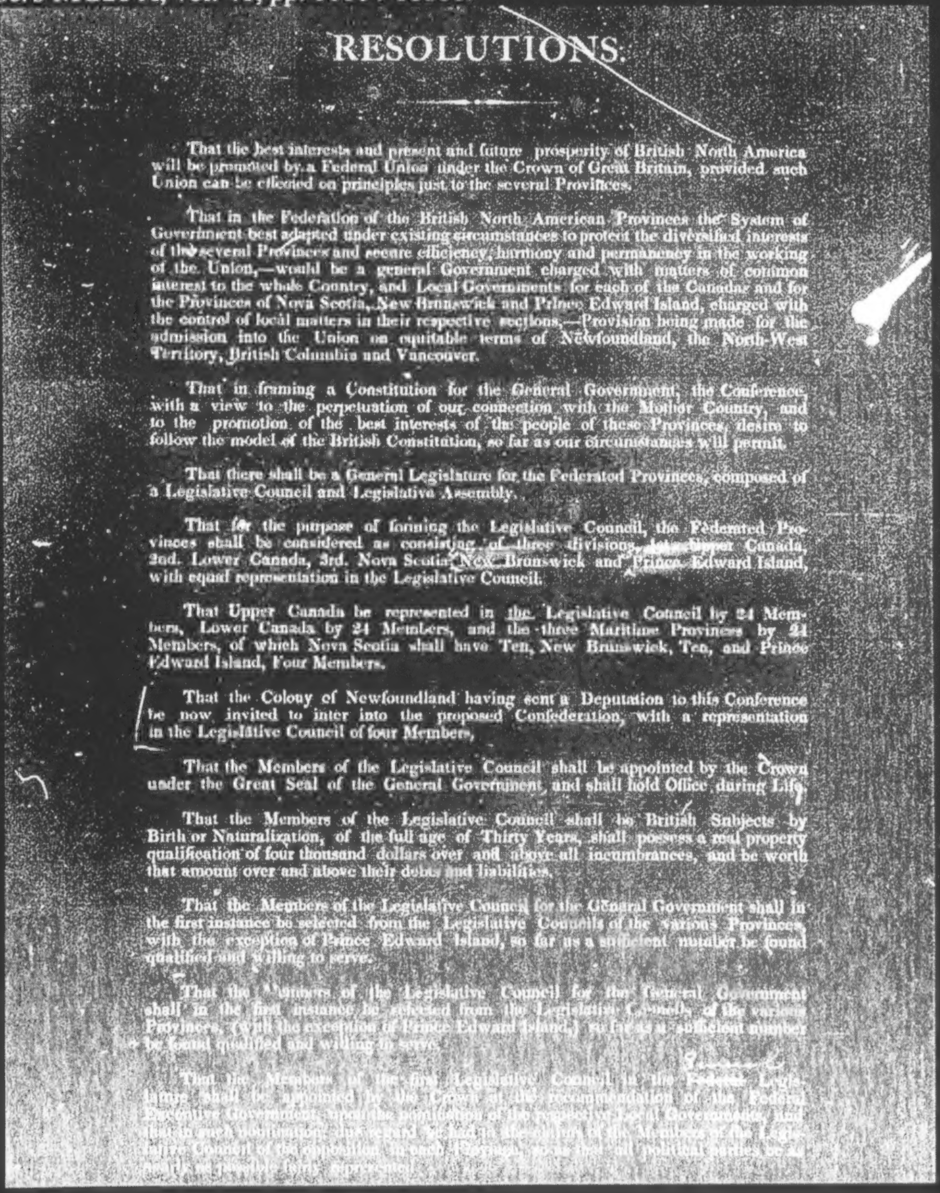
68. *The General Government shall secure, without delay, the completion of the Intercolonial Railway from Rivière-du-Loup through New Brunswick to Truro in Nova Scotia.*	65. *The construction of the Intercolonial Railway being essential to the consolidation of the Union of British North America, and to the assent of the Maritime Provinces thereto, it is agreed that provision be made for its immediate construction by the General Government, and that the Imperial guarantee for 3,000,000l. sterling pledged for this work be applied thereto, so soon as the necessary authority has been obtained from the Imperial Parliament.*
69. The communications with the North-Western Territory, and the improvements required for the development of the trade of the great west with the seaboard, are regarded by this Conference as subjects of the highest importance to the *Federated Provinces*, and shall be prosecuted at the earliest possible period that the state of the finances will permit.	66. The communication with the North-Western Territory, and the improvements required for the development of the trade of the great west with the seaboard, are regarded by this Conference as subjects of the highest importance to the *Confederation*, and shall be prosecuted at the earliest possible period that the state of the finances will permit.
70. The sanction of the Imperial *and Local Parliaments* shall be sought for the Union of the Provinces, on the principles adopted by *the* Conference.	67. The sanction of the Imperial Parliament shall be sought for the Union of the Provinces on the principles adopted by *this* Conference.
71 That Her Majesty the Queen be solicited to determine the rank and name of the *Federated Provinces.*	68. That Her Majesty the Queen be solicited to determine the rank and name of the *Confederation.*
72. *The proceedings of the Conference shall be authenticated by the signatures of the Delegates, and submitted by each Delegation to its own Government, and the Chairman is authorized to submit a copy to the Governor-General for transmission to the Secretary of State for the Colonies.*	69. *That a copy of these Resolutions, signed by the Chairman and Secretary of the Conference, be transmitted to the Right Honourable the Secretary of State for the Colonies.*

(Signed) JOHN A. MACDONALD,
Chairman.
H. BERNARD,
Secretary.

Appendix B

II. Draft of the *Quebec Resolutions*

National Archives of Canada, "Draft Resolutions, Quebec Conference" *Macdonald Papers* MG26 A, vol. 46, pp. 18164-18168.



RESOLUTIONS.

That the best interests and present and future prosperity of British North America will be promoted by a Federal Union under the Crown of Great Britain, provided such Union can be effected on principles just to the several Provinces.

That in the Federation of the British North American Provinces the System of Government best adapted under existing circumstances to protect the diversified interests of the several Provinces and secure efficiency, harmony and permanency in the working of the Union,—would be a general Government charged with matters of common interest to the whole Country, and Local Governments for each of the Canadas and for the Provinces of Nova Scotia, New Brunswick and Prince Edward Island, charged with the control of local matters in their respective sections,—Provision being made for the admission into the Union on equitable terms of Newfoundland, the North-West Territory, British Columbia and Vancouver.

That in framing a Constitution for the General Government, the Conference, with a view to the perpetuation of our connection with the Mother Country, and to the promotion of the best interests of the people of these Provinces, desire to follow the model of the British Constitution, so far as our circumstances will permit.

That there shall be a General Legislature for the Federated Provinces, composed of a Legislative Council and Legislative Assembly.

That for the purpose of forming the Legislative Council, the Federated Provinces shall be considered as consisting of three divisions, ~~1st.~~ Upper Canada, 2nd. Lower Canada, 3rd. Nova Scotia, New Brunswick and Prince Edward Island, with equal representation in the Legislative Council.

That Upper Canada be represented in the Legislative Council by 24 Members, Lower Canada by 24 Members, and the three Maritime Provinces by 24 Members, of which Nova Scotia shall have Ten, New Brunswick, Ten, and Prince Edward Island, Four Members.

That the Colony of Newfoundland having sent a Deputation to this Conference be now invited to inter into the proposed Confederation, with a representation in the Legislative Council of four Members,

That the Members of the Legislative Council shall be appointed by the Crown under the Great Seal of the General Government, and shall hold Office during Life.

That the Members of the Legislative Council shall be British Subjects by Birth or Naturalization, of the full age of Thirty Years, shall possess a real property qualification of four thousand dollars over and above all incumbrances, and be worth that amount over and above their debts and liabilities.

That the Members of the Legislative Council for the General Government shall in the first instance be selected from the Legislative Councils of the various Provinces, with the exception of Prince Edward Island, so far as a sufficient number be found qualified and willing to serve.

That the Members of the Legislative Council for the General Government shall in the first instance be selected from the Legislative Councils of the various Provinces, (with the exception of Prince Edward Island,) so far as a sufficient number be found qualified and willing to serve.

That the Members of the first Legislative Council in the ~~Federal~~ Legislature shall be appointed by the Crown at the recommendation of the Federal Executive Government, upon the nomination of the respective Local Governments, and that in such nomination due regard be had to the claims of the Members of the Legislative Council of the opposition in each Province, so as that all political parties be as nearly as possible fairly represented.

That the basis of Representation in the House of Commons, shall be Population, as determined by the Official Census every ten years; and that the number of Members at first shall be 194, distributed as follows:

Upper Canada	82
Lower Canada	65
Nova Scotia	19
New Brunswick	15
Newfoundland	8
and Prince Edward Island	5

That each section shall distribute its Representatives in such Electoral Divisions as it deems best.

That until the Official Census of 1871 has been made up, there shall be no change in the number of Representatives from the several sections.

That immediately after the completion of the Census of 1871, and immediately after every Decennial Census thereafter, the Representation from each section shall be re-adjusted on the basis of Population.

That for the purpose of such re-adjustments, Lower Canada shall always be assigned sixty-five members, and each of the other sections shall at each such re-adjustment receive, for the ten years then next succeeding, the number of members to which it will be entitled on the same ratio of representation to population as Lower Canada will enjoy according to the Census then just taken by having sixty-five members.

That no reduction shall be made in the number of Members returned by any section, unless its population shall have decreased relatively to the whole population of the whole Federation, to the extent of five per centum or over.

That in computing at each decennial period, the number of Members to which each section is entitled, no fractional parts shall be considered, unless when exceeding one half the number entitling to a Member, in which case a Member shall be given for each such fractional part.

That the number of Members may at any time be increased by the Federal Parliament,—regard being had to the proportionate rights then existing.

That the Legislature of each Province shall divide such Province into the proper number of constituencies and define the boundaries of each of them.

That there shall be a session of the Legislative Council and Assembly once at least in every year, so that a period of twelve calendar months shall not intervene between the last sitting of the Legislative Council and Assembly in one session and the first sitting of the Legislative Council and Assembly in the next session: And every Legislative Assembly shall continue for five years from the day of the return of the writs choosing the same and no longer, subject nevertheless to be sooner prorogued or dissolved by the Governor.

That until provisions shall otherwise be made by the Legislature of the Federated Provinces, all the Laws which, at the date of the Proclamation constituting such Confederation, are in force in the Provinces respectively relating to the qualification and disqualification of any person to be elected or to sit or vote as a member of the Assembly in the said Provinces respectively—and relating to the qualification or disqualification of voters, and to the oaths to be taken by voters, and to Returning Officers and the powers and duties thereof,—and the proceedings at Elections,—and the period during which such Elections may be continued, and relating to the Trial of Controverted Elections, and the proceedings incident thereto and to the vacating of seats of Members and the issuing and execution of new Writs in case of any seat being vacated otherwise than by a dissolution,—shall respectively be applied to Elections of Members to serve in the Legislative Assembly of the Federated Provinces, for places situate in those Provinces respectively for which such Laws were passed.

That the Executive Authority or Government shall be vested in the Sovereign of the United Kingdom of Great Britain and Ireland, and be administered according to the well understood principles of the British Constitution by the Sovereign personally or by Representative duly authorized.

That the Sovereign or Representative of the Sovereign shall be Commander in Chief of the Land and Naval Militia Forces.

That with a view of relieving the expenses of the Local Governments, it shall be left to each Province to recommend the reconstruction of its Local Constitution, in such a way as shall be most acceptable to its own Legislature: Provided that in such reconstruction nothing be contained [illegible] with the Constitution of the Federal Government.

That for each of the Provinces, there shall be an Executive Officer, styled the Lieutenant Governor, who shall be appointed by the Governor General in Council, under the Great Seal of the Federated Provinces, during pleasure; such pleasure not to be exercised before the expiration of the first five years, except for cause; such cause to be communicated in writing to the Lieutenant Governor immediately after the exercise of the pleasure as aforesaid, and also by message to both Houses of the General Legislature, within the first week of the first Session afterwards.

That it shall be competent for the General Legislature to make Laws for the peace, welfare and good Government of the Federated Provinces (saving the Sovereignty of England) and especially Laws respecting:—

1. Trade and Commerce.
2. The imposition or regulation of Duties of Customs on Imports and Exports.
3. The imposition or regulation of Excise Duties.
4. All or any other modes or systems of Taxation.
5. Currency and Coinage.
6. The Borrowing of Money on the Public Credit.
7. Banking and the issue of paper money.
8. The law relating to Bills of Exchange and Promissory Notes.
9. Interest.
10. Legal Tender.
11. Weights and Measures.
12. Postal Service.
13. Bankruptcy and Insolvency Laws.
14. Beacons, Buoys and Light Houses.
15. Navigation and Shipping.
16. Sea Fisheries.
17. Patents of Invention and Discovery.
18. Copy Rights.
19. Telegraphic Communication and the incorporation of Telegraph Companies.
20. Naturalization and Aliens.
21. Marriage and Divorce.
22. The Census.
23. Militia—Military and Naval Service and Defence.
24. Immigration.
25. Agriculture.
26. The Criminal Law, (except the Constitution of Courts of Criminal Jurisdiction.)
27. Lines of Steamships or other Ships, Railways and Canals, connecting any two or more of the Provinces together.
28. Lines of Steamships between the Federated Provinces and other Countries.

That it shall be competent for the Local Legislatures to make Laws respecting:—

1. Agriculture.

2. Education; saving the rights and privileges which the Protestant or Catholic minority in both Canadas may possess as to their Denominational Schools, at the time when the Constitutional Act goes into operation.

3. Immigration.

4. The sale and management of Public Lands, excepting Lands belonging to the General Government.

5. Property and civil rights, excepting those portions thereof assigned to the General Legislature.

6. Municipal Institutions.

7. Sea coast and Inland Fisheries.

8. The establishment, maintenance and management of Penitentiaries, and of Public and Reformatory Prisons.

9. The establishment, maintenance and management of Hospitals, Asylums, Charities and Eleemosynary Institutions.

10. Local Works.

11. The Administration of Justice and the Constitution, maintenance and organization of the Courts—both of Civil and Criminal Jurisdiction.

That it shall be competent for the Local Legislatures to make laws respecting :—

12. The establishment and tenure of local Offices, and the appointment and payment of local Officers,

13. Direct Taxation,

14. Borrowing Money on the credit of the Province,

15. Shop, Saloon, Tavern, Auctioneer and other licenses,

16. The Incorporation of private or local Companies, except such as relate to matters assigned to the Federal Legislature,

17. And generally all matters of a private or local nature,

18. The local Legislature of each Province may from time to time alter the Electoral Districts of the Province for the purposes of Representation in the House of Commons, and distribute the number of representatives to which the Province is entitled in any manner such Legislature may think fit.

19. The power of respiting, reprieving, commuting and pardoning Prisoners convicted of crimes, and of remitting of sentences in whole or in part, which belongs of right to the Crown, shall be administered by the Lieutenant Governor of each Province in Council, subject to any instructions he may from time to time receive from the General Government, and subject to any provisions that may be made in this behalf by the General Legislature.

That the Local Legislature shall have power to provide for inflicting punishment by fine, penalties, imprisonment or otherwise for the breach of laws passed in relation to any subject within their jurisdiction.

That in regard to those subjects over which jurisdiction belongs to both the General and Local Governments, the laws of the General Government shall control and supersede those made by the Local Government, and the latter shall be void so far as they are repugnant to or inconsistent with the former.

To postpone the consideration of,—

That all lands, mines and minerals vested in Her Majesty in any of the said Provinces for the use of such Province, shall belong to the Local Government of the territory in which the same are so situate ; subject to any trusts that may exist in respect to any of such lands or to any interest of other person in respect of the same.

That all sums due from purchasers or lessees of such lands, at the time of the Union, shall also belong to the Local Governments.

1. It shall be competent for the General Legislature to pass laws respecting—

   1. The Indians, and Lands reserved for the Indians,
   2. Ferries between any Province and a Foreign Country or between any two Provinces,
   3. Respecting Savings Banks, and
   4. Quarantine.

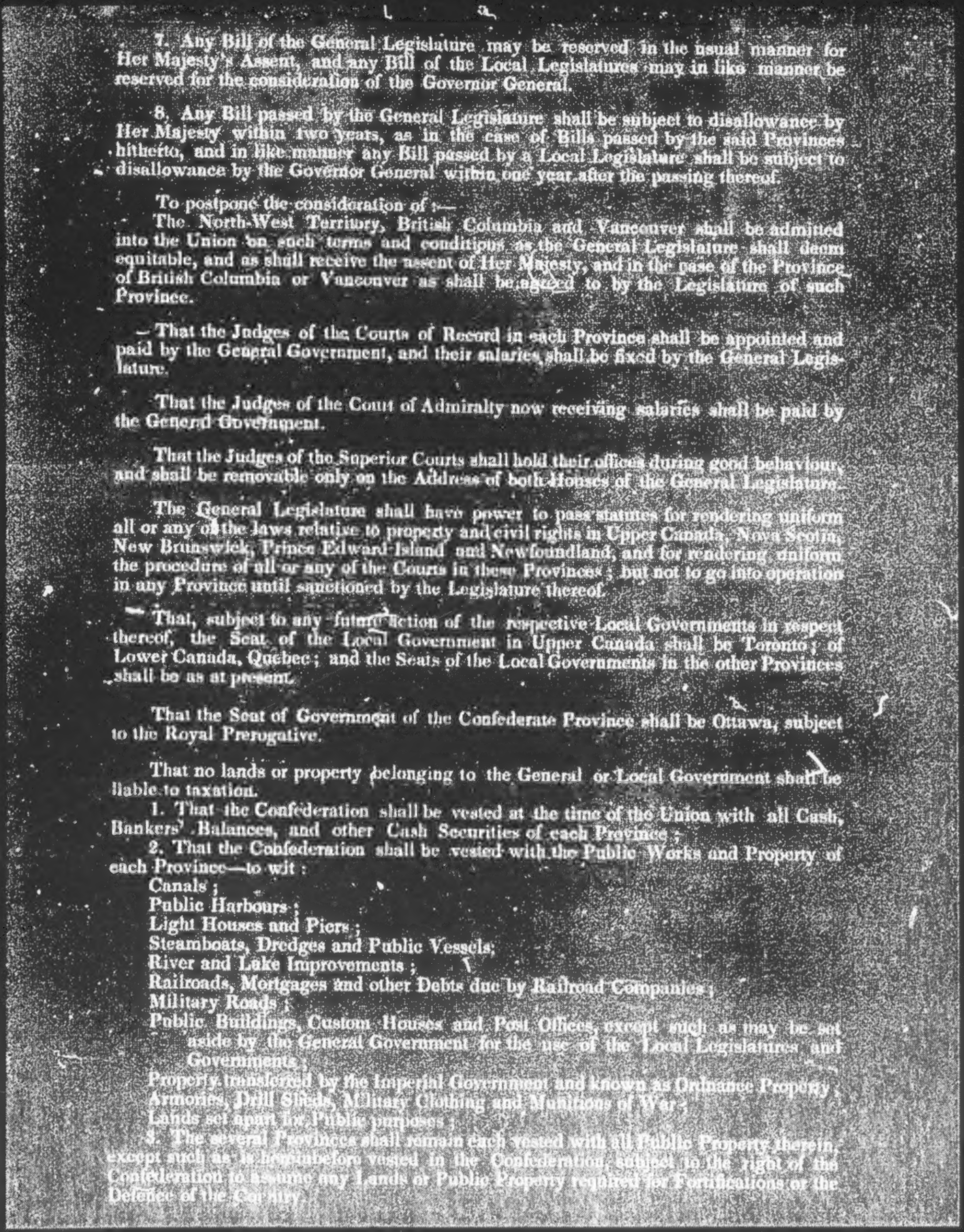
2. The General Government and Legislature shall have all powers necessary or proper for performing the obligations of the Province as part of the British Empire to Foreign Countries, arising under Treaties between Great Britain and such Countries.

3. All Courts, Judges and Officers of the several Provinces shall aid, assist and obey the General Government in the exercise of its rights and powers and for such purposes shall be held to be Judges and Officers of the General Government.

4. The General Legislature may also, from time to time, establish additional Courts, and the General Government thereupon appoint other Judges and Officers, when the same shall appear necessary or for the public advantage, in order to the due execution of the laws of the General Legislature.

5. All Bills for appropriating any part of the Public Revenue, or for imposing any new Tax or Impost, shall originate in the House of Commons or the Local Assembly, as the case may be.

6. The House of Commons or Legislative Assembly shall not originate or pass any Vote, Resolution, Address or Bill for the appropriation of any part of the Public Revenue, or of any Tax or Impost, to any purpose, not first recommended to the House, or Assembly, by Message of the Governor General or the Lieutenant Governor, as the case may be, during the Session in which such Vote, Resolution, Address or Bill is passed.



7. Any Bill of the General Legislature may be reserved in the usual manner for Her Majesty's Assent, and any Bill of the Local Legislatures may in like manner be reserved for the consideration of the Governor General.

8. Any Bill passed by the General Legislature shall be subject to disallowance by Her Majesty within two years, as in the case of Bills passed by the said Provinces hitherto, and in like manner any Bill passed by a Local Legislature shall be subject to disallowance by the Governor General within one year after the passing thereof.

To postpone the consideration of :—

The North-West Territory, British Columbia and Vancouver shall be admitted into the Union on such terms and conditions as the General Legislature shall deem equitable, and as shall receive the assent of Her Majesty, and in the case of the Province of British Columbia or Vancouver as shall be agreed to by the Legislature of such Province.

That the Judges of the Courts of Record in each Province shall be appointed and paid by the General Government, and their salaries shall be fixed by the General Legislature.

That the Judges of the Court of Admiralty now receiving salaries shall be paid by the General Government.

That the Judges of the Superior Courts shall hold their offices during good behaviour, and shall be removable only on the Address of both Houses of the General Legislature.

The General Legislature shall have power to pass statutes for rendering uniform all or any of the laws relative to property and civil rights in Upper Canada, Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland, and for rendering uniform the procedure of all or any of the Courts in these Provinces; but not to go into operation in any Province until sanctioned by the Legislature thereof.

That, subject to any future action of the respective Local Governments in respect thereof, the Seat of the Local Government in Upper Canada shall be Toronto; of Lower Canada, Quebec; and the Seats of the Local Governments in the other Provinces shall be as at present.

That the Seat of Government of the Confederate Province shall be Ottawa, subject to the Royal Prerogative.

That no lands or property belonging to the General or Local Government shall be liable to taxation.

1. That the Confederation shall be vested at the time of the Union with all Cash, Bankers' Balances, and other Cash Securities of each Province;

2. That the Confederation shall be vested with the Public Works and Property of each Province—to wit :

Canals;
Public Harbours;
Light Houses and Piers;
Steamboats, Dredges and Public Vessels;
River and Lake Improvements;
Railroads, Mortgages and other Debts due by Railroad Companies;
Military Roads;
Public Buildings, Custom Houses and Post Offices, except such as may be set aside by the General Government for the use of the Local Legislatures and Governments;
Property transferred by the Imperial Government and known as Ordnance Property;
Armories, Drill Sheds, Military Clothing and Munitions of War;
Lands set apart for Public purposes;

3. The several Provinces shall remain each vested with all Public Property therein, except such as is hereinbefore vested in the Confederation, subject to the right of the Confederation to assume any Lands or Public Property required for Fortifications or the Defence of the Country.

Appendix C

I. Master, Servant, and Slave: Sections 12 and 13 as a Codification of the role of the Governor-General in the *British North America Act, 1867*.

Canada has been accused of having a "friendly dictatorship."[1] It has been argued that the Prime Minister has accumulated into his own office nearly all the executive and legislative power of the federal government. Ironically, this "friendly dictatorship" can equally be seen as nothing more than the replacement of an earlier 'friendly oligarchy,' where Cabinet had accumulated nearly all the same executive and legislative power of the federal government. In fact, one can almost trace an increasingly narrower and narrower body of persons who exercise legislative and executive power. The basic form of the Canadian constitution dates to the Settlement of 1689 in England (which was variously received into Canada through British rule and colonization, most significantly with the *Constitution Act, 1867* [formerly the *British North America Act, 1867*] (hereafter referred to as the BNA Act). In that constitution, the Crown, Lords, and Commons both *de facto* and *de jure* shared legislative and executive powers. As the constitution evolved, this *de jure* balance was maintained in the Canadian constitution, but the *de facto* executive and legislative powers were increasingly transferred to the Commons. Once the Commons had effectively acquired all these powers from the other two branches of Parliament, they were then further consolidated into the hands of the majority caucus, then to the cabinet, and finally today to the Prime Minister. This concentration of power can be blamed upon the generally "unwritten" or uncodified nature of much of the Canadian Constitution which grants incredible flexibility to the *de facto* exercise of executive and legislative powers. However, it is generally overlooked that the process of transferring the unwritten rules of the British Constitution to Canada resulted in an attempt to codify and clarify contemporary conventions into the BNA Act. Despite popular and even current academic conceptions, the BNA Act did not mark "the beginning of a new state, a new nationality, and a new community of citizens."[2] Canada remained a colony of Britain both *de jure* and *de facto* and the BNA Act reflects both Canada's colonial status as well as the contemporary conceptions of both the basis and the proper exercise of sovereignty. This is evident in how the BNA Act calls upon the Governor-General to exercise his powers. A close reading of the un-amended and unconsolidated *British North America Act, 1867* interpreted through the lens of mid-Victorian British political and imperial thought reveals an attempted codification of the powers of the Governor-General.

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[1] See Jeffrey Simpson, *The Friendly Dictatorship* (Toronto: McClelland & Stewart, 2001).

Currently, the role of the Governor-General is almost entirely ceremonial, with the "reserved" powers of the office only ever to be used in the gravest of situations. Conventionally the Governor-General is to exclusively act on the advice of his Prime Minister and Cabinet and never on his own or even in council with anyone else. It is widely assumed even in 1867 that the limitations on and method of exercising the powers of the Governor-General would generally be guided by the pre-existing unwritten conventions of the Westminster and Imperial constitutions. Section 12 and section 13 of the BNA Act lay out the exercise of the powers of the

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[2] Janine Brodie, "Three Stories of Canadian Citizenship," in R. Adamoski, et al. *Constructing Canadian Citizenship: Historical Readings* (Vancouver: Broadview Press, 2002), 1

Governor-General. Both in Reesor's *Clause-by-Clause Analysis*[3] and McConnell's *Commentary*[4] on the BNA Act, the respective authors conclude that the purpose of section 12 was to merely transfer the powers of the former Governor-General of the Province of Canada and the Lieutenant-Governors of the Maritime colonies to their new positions and ascribe section 13 as the relevant section for the application of the Governor's-General power.[5] However, Reesor refers to this section as "confusing"[6] given that throughout the rest of BNA Act there is a lack of consistency the references to both the Governor-General exercising power and to the Governor-General-in-Council exercising power. Reesor finds the section wholly inconsistent because there are even occasions when the Governor-General is called upon to exercise his powers under the Great Seal of Canada, which he argues requires the advice of the Prime Minister and/or Cabinet since the Great Seal must be used conjointly with a minister of the Crown.[7] McDonnell is equally critical of Section 13, noting that since Lord Elgin (in 1848) the convention of the Governor-General acting only upon the advice of his elected cabinet ("responsible government") was established with the passage of the *Rebellion Losses Act* (which Elgin had considered repugnant). McDonnell believes this "section says either too much or too little"[8] since it would imply that the Governor-General is to sometime act on the advice of his cabinet and other times he is not to, even though McDonnell would claim convention states otherwise. Thus, to McDonnell, section 13 becomes "redundant"[9] since it only haphazardly expresses the supposedly pre-existing convention of responsible government. Even in constitutional surveys that are not specifically critical of section 12 and 13, simply ascribe it with those same powers as Reesor and McDonnell variously do of transferring power of the pre-Confederation Viceroy to the post-Confederation Viceroy.[10]

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[3] Bayard Reesor, Canadian Constitution in Historical Perspective with a Clause-by-Clause Anaylsis of the Constitution Acts and the Canada Act, (Scarborough: RR Donnelly and Sons, 1992), pp. 154-156.
[4] W. H. McConnell, *Commentary on the British North America Act*, (Toronto: Macmillian of Canada, 1977), pp. 48-50
[5] Section 13 reads "The Provisions of this Act referring to the Governor-General in Council shall be construed as referring to the Governor-General acting by and with the Advice of the Queen's Privy Council for Canada"
[6] Reesor, 195.
[7] Reesor, 155.
[8] McDonnell, 50.

However, considering that the BNA Act was the first constitution written for a settler colony since the convention of responsible government was established, it would seem likely the Colonial Office administrators in London would be keen to clarify the role of the Governor-General who was to act in the possibly contradictory role as the servant of the British Cabinet, the servant ('slave') of the Canadian Cabinet, as well as exercising some executive powers on his own. Although by 1867 most executive power was exercised by those "advisors" from the houses of Parliament (and primarily from the Commons), it was still seen as both acceptable and appropriate for the Queen (and her overseas representatives) to act independently at times. Thus given the context of Mid-Victorian politics it only makes sense that the BNA Act should lay out how the Governor-General is to fulfill these contradictory roles.

The important piece of contextual political theory that is most relevant in reading the *British North America Act, 1867* is to illustrate that the document presupposes, and is based upon, *parliamentary* sovereignty and not *popular* sovereignty. Although nearly every Western sovereignty theorist since the middle-ages[11] – including Bodin and Hobbes – agree that sovereignty *originally* rested with "the people," the fundamental basis of Hobbesian thought and the political thought that underlaid British Political theory in 1867, was that sovereignty had been alienated from the people at a single point in time and from thence forward exercised by King-in-Parliament.[12] In 1688 and for much of the 18th century, the basis of the British Constitution was the balance of Crown (dictatorship), Lords (aristocracy), and Commons (democracy) which resulted in a similar balance and separation of executive, legislative, and judicial branches that led to a constitution that provided both for efficiency and liberty.[13] However, by 1867 this "balance" was disappearing, being replaced by "fusion"[14] of legislative and executive powers exercised by the Cabinet through the system of responsible government.[15] Although Bagehot argues in the *English Constitution* that responsible government made the crown merely the "dignified" (read "ceremonial") part of constitution and left the Commons and the Lords to be the "efficient" part of the constitution – those which "employ the power" of the constitution[16] – Lord Durham equally argues in the 1830s (both in Britain and in Canada) that the institution of responsible government was meant to restore the "balance" in the constitution.[17] Although the inevitable outcome of responsible government may be the practical transfer of all of the powers of the Crown to the Cabinet and a paradigmatic shift in political theory to popular sovereignty (since this new body which holds executive power and directs legislative power is ultimately responsible to a popularly elected and representative House of Commons), this does not mean that in 1867 it was widely believed that the Crown was no longer to independently exercise *any* powers, especially in the colonial sphere. The preamble of the Australian constitution (the *Commonwealth of Australia Constitution Act, 1900* hereafter referred to as the CAC Act) in contrast to the BNA Act illustrates that in the intervening years between 1867 and 1900, popular sovereignty had become the *de facto* basis of constitutional thought, as expressed in the writing of this Act of the British Parliament. Whereas the BNA Act's preamble reads: "Whereas *the Provinces* of Canada, Nova Scotia, and New Brunswick have *expressed their Desire* to be federally united" [emphasis added], the CAC Act's preamble reads: "Whereas *the people* of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have *agreed* to unite" [emphasis added]. Thus sovereignty is passed from "the provinces" who make requests to the Imperial Parliament, to "the people" who themselves "agree." Further, immediately before the BNA Act was passed, the subservience of popular legislatures in the empire was re-confirmed in the *Colonial Laws Validity Act, 1865* which re-confirmed that colonial legislatures were subservient to the Imperial legislature and not just the Imperial Crown and therefore that the Governor-General in 1867 was clearly designed not only be a representative of the Crown, but as an officer of the Imperial Government.

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[9] McDonnell, 50.

[10] See, for example, Patrick Monahan's recent *Constitutional Law*, (Concord, Ontario: Publications for Professionals, 1997), 65-66

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[11] Charles Edward Merriam, *History of the Theory of Sovereignty since Rousseau* (New York: The Columbia university press, 1900), 12-13.

[12] Walter Bagehot, *The English Constitution* (Ithaca, NY: Cornell University Press, 1966), 60. This point of alienation was generally understood to be the Settlement of 1688 that brought in the "balanced constitution" of Crown, Lords, and Commons.

[13] Janet Ajzenstat, *The Political Thought of Lord Durham*, (Kingston: McGill-Queen's University Press, 1988), 53.

[14] Bagehot, 65.

[15] To a limited degree this, fusion began with the premiership of Walpole (1720 to 1740) and began the road to orthodox practice with George III's first bout of insanity in 1788. Although, this system of responsible government with the "fusion" of executive and legislative powers through a Cabinet came to rely more and more heavily on the House of Commons – the "popular" element of the British Constitution – it was still both *de facto* and *de jure* based upon the premise the sovereignty of Parliament itself and not of the people through Parliament.

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[16] Bagehot, 61.
[17] Ajzenstat, 63.

My proposition that the BNA Act intended to outline in a codified way the Governor-General's contradictory roles is illustrated in contrast, again, to the CAC Act. The CAC Act does contains an equivalent to section 13 almost verbatim (in Chapter 2, section 63),[18] yet lacks an equivalent to section 12. Given Reesor's and McDonnell's argument that section 12 was merely a tool to transfer the former powers of the Governor-General and Lieutenant-Governors, than an equivalent to section 12 should be present in the CAC Act which federated colonies with those same pre-existing offices. None exists because the contradictory role of the Governor-General had generally disappeared by 1900. By the time the CAC Act was passed Governors-General lapsed in being servants of the British Cabinet and officers of the Imperial Government with the provision of High Commissioners to fulfill those roles. As well, the CAC Act is generally consistent in that on any discretionary matter the Governor-General is to only act on the advice of his ministers (exceptions to this include the Imperial veto of Sections 58 to 60 – equivalent to sections 55 to 57 in the BNA Act – and the Governor-General's non-discretionary powers as outlined by constitutional rules – such as dissolving Parliament if the two houses can not agree on legislation). Thus the CAC Act had no need to differentiate the roles of the Governor-General as being a servant of the British Cabinet, his own autonomous executive, and a servant of the Dominion Cabinet, as his role was almost exclusively the latter. Therefore section 12 should not be interpreted as exclusively as Reesor and McDonnell do, but it should be interpreted as also outlining how the Governor-General is to exercise his powers in his contradictory roles.

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[18] Chapter 2, section 63 reads "The provisions of this Constitution referring to the Governor-General in Council shall be construed as referring to the Governor-General acting with the advice of the Federal Executive Council."

The wording of section 12 and the various uses of the executive power create four "tiers" in which the Governor-General is called to exercise his powers as there are five different terms used to describe the exercise of executive power. These five terms are i) the "Queen in Council," ii) the "Governor-General," iii) the "Governor-General under the Great Seal of Canada," iv) the "Governor-General in Council", and v) the "Governor-General in Council under the Great Seal of Canada." Ironically, it is what Reesor considered contradictory and "confusing" – calling upon the Governor-General to act with the Great Seal of Canada without "council" – that is actually the key indicator that the BNA Act calls upon the Governor-General to exercise his powers in different ways since it varyingly calls upon the Governor-General to act under the Great Seal of Canada both with Council (s. 58, 93) and without (s.24, 26, 32, 34, 38,). For this indicates that the authors of the BNA Act were not merely 'sloppy' and "inconsistent" with their use of the term "in council," but envisioned specific ways in which the Governor-General would exercise the powers of his office. Section 12 is a relatively long section that commences with transferring many of the powers of pre-Confederation Governor-General and Lieutenant-Governors to the new post-Confederation office of Governor-General.

The section continues, however, with a rather long and seemingly verbose declaration that these executive powers are to "be vested in and exerciseable [*sic*] by the Governor-General, with the Advice or with the Advice and Consent of or in conjunction with the Queen's Privy Council for Canada, or any Members thereof, or by the Governor-General individually, as the Case requires." However, if one closely reads this section one will notice four different scenarios listed. Section 12 calls upon the Governor-General to exercise his powers i) "with the *Advice*… of the Queen's Privy Council for Canada, or any Members thereof" or ii) "with the *Advice and Consent*… of the Queen's Privy Council for Canada, or any Members thereof" or iii) "*in conjunction* with the Queen's Privy Council for Canada, or any Members thereof," or iv) by the *Governor-General individually*" and to do each of these "*as the Case requires*." Thus, by examining the wording of section 12 and 13 with the various ways in which the Governor-General is called to exercise his powers, one discovers four effectively codified ways in which his powers are to be exercised. The four ways that the Governor-General is called upon to act is as the servant of the Canadian Cabinet, a servant of the Imperial Government, in conjunction with the Canadian Cabinet, and finally according to his own will (with or without advice from the Privy Council of Canada).

The first two ways in which the Governor-General is called to exercise his powers is effectively in a non-discretionary way. He is simply called upon exercise those powers on behalf of others. In the first case he is to wholly defer his executive power to the British Cabinet (the "Queen in Council"). Although this circumstance is not reflected in section 12, it is clear that the intent here is for the power to be exercised by the British Cabinet. After sections 9 and 10, whence power of the executive is invested in the Queen and declared to be administered by the Governor-General, the Queen (instead of the Governor-General) is only ever referred to exercising executive power in sections 55, 56, and 58, and only ever "in council." Further, given that these sections are those that grant a veto over Canadian legislation and were thus only ever intended to be used in rare circumstances it is clearly evident that in said circumstances the Governor-General is to defer his executive power to the Imperial Parliament at the Palace of Westminster. The second non-discretionary exercising of his powers is the most common and refers to sections of the BNA Act where the Governor-General is to employ his powers either "in Council" or "under the Great Seal of Canada in Council." This is where the Governor-General is to simply follow the pre-existing convention of responsible government and put the whole of his executive powers in the hands of his elected ministers who carry the confidence of the Commons such as is called upon him in section 12 where he is to exercise his powers "with the Advice and *Consent*… of the Queen's Privy Council for Canada."

However, after considering these two circumstances, the Governor-General is nonetheless left with significant areas in which the BNA Act calls upon him to exercise the powers of his office in a discretionary way. The first of these is those powers in which the Governor-General can only act under the Great Seal of Canada. Although this occurs in a few sections of the BNA Act, they fall into two categories. The first of these is laid out in section 38 where the Governor-General is granted the power to "summon and call together" Parliament and the second category are those defined under sections 24, 32, and 34 which all deal with appointing Senators. In the context of 1867 (and perhaps even today), it makes perfect sense that these are powers that should be exercised by the Governor-General semi-autonomously from his Ministers. Obviously summoning Parliament should only be done in consultation with Ministers who will be running the government and thus introducing most legislation and responding to issues, but doing so should not exclusively be done on their consent so that the Crown's ministers can not avoid parliament when an embarrassing issue has arisen. The Governor-General, thus, should only summon Parliament after extensively consulting with the government ministers, but he should not be constrained by those same ministers. This equally applies to appointing individuals to the Senate. The original role of the Senate as a bulwark of landed interests against popular excesses necessitates that its appointments should not simply be done by the "popular" house. However, the Senate was to also represent regional interests which could only ably be carried out by local ministers. Thus, senatorial appointments were actions that should only ever be taken with significant input and in conjunction with ministers, but to fulfill its role as a bulwark against democratic excesses it could not be totally at the mercy of elected members.

Thus remains the last collection of executive powers of the Governor-General, which are required neither to be done with either the "consent" nor "in conjunction" with the Queen's Privy Council for Canada, but to be done merely on the "Advice… of the Queen's Privy Council for Canada" or by the "Governor-General individually."

Generally these powers can be divided into three categories.[19] The first, granted in section 14, is the power to appoint "deputies," or individuals to carry out the powers the Governor-General. Given that in 1867 the Governor-General was a servant of the Imperial Parliament and was appointed without Canadian consultation by that body, it would make little sense that the constitution would require this Governor-General to consult his Canadian ministers when delegating his powers to deputies. If he was required to consult with his Canadian ministers in such appointments, it would undermine the autonomy that his office was to exercise from those ministers and thus they could not perform their duties without suspect.

The second category of powers that the Governor-General was to exercise independently was the power to dissolve Parliament as granted in section 50 of the BNA Act. Parliament is generally dissolved before the five-year statutory limit only upon a loss of confidence in government or when a government feels that its mandate has been spent and requires fresh elections to renew its mandate. In the case of the former, given that the ministers from whom the Governor-General would be taking counsel if he was required to act "in-council" would be those same members who had just lost the confidence of the house, it would seem especially silly in the 1867 context to force the Governor-General to act on their behalf. Thus, in said circumstance the Viceroy should be acting only in his own good sense and with the advice of those he chooses to take. In the latter case, it would again be considered to be in the Governor-General's independent decision as to whether a Government's mandate is truly spent, or whether his ministers are simply making a politically expedient maneuver.

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[19] There is a forth possible category, that being the executive power expressed in section 54 which requires all bills for money votes to be recommended by the Governor-General, but with no mention of being done so "in council." However, this is the one occurrence where doing so would be redundant as full cabinet ministers can only initiate money bills. As well, given that control of the purse strings was equally understood in 1867 as probably the most important day-to-day power, the Governor-General's veto over such measures both at the beginning (before a bill is introduced) and at the end (giving assent to a bill) gives the Governor-General significant reserve powers and requires that he be well informed of all major legislation before it can even be introduced.

The third category of powers that the Governor-General was to exercise independently was the power to appoint Judges as granted in sections 96 to 99 of the BNA Act. In the mid-Victorian context (as today), judges were supposed to act independently of popular desires and make their decisions solely upon the law. Thus, in 1867, it would have been seen to be somewhat compromising to have the superior judges effectively appointed by the popularly elected body or even with extensive consultation with His Majesty's ministers. Autonomy of the judges from popular desires and political maneuverings would best be seen as being guaranteed by the autonomous actions of the Governor-General who, in 1867, was considered to be dispassionate about popular local desires because he was an external (British) appointment. However, the requirement that judges were to be appointed from the respective bars of the various colonies/provinces meant that the appointments would not be made ignorantly as some consultation with the legal establishment would effectively be required.

Although the various phrases employed in section 12 are never directly tied to the various phrases used throughout the BNA Act where executive power is employed, their intended correspondence is nonetheless clear. Further, even though a close reading of the BNA Act outlines the intended role of the Governor-General, those various authors who have written commentaries on the BNA Act and failed to see this connection have also seemingly ignored contemporary documentary evidence that would clarify the intent behind sections 12 and 13. An examination of the various Letters-Patent of the Governors-General in the first decade after Confederation more clearly demarcate the Governor's-General role.[20] Although these "codifications" of contemporary conventions in the BNA Act rapidly fell into disuse and would be repugnant to modern sensibilities if "properly" exercised today, an analysis of this sort is highly useful. Many judicial or other interpretations of the Constitutions revolve around attempting to elucidate the "intent" of the original document. What this analysis indicates is that even when such intent is spelled out, paradigmatic shifts in political theory and language can render future analyses anachronistic if no effort is properly made to understand the document in its own context.

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[20] Peter W. Noonan, *The Crown and Constitutional Law in Canada* (Calgary: Sripnoon Publications, 1998), 104-108.

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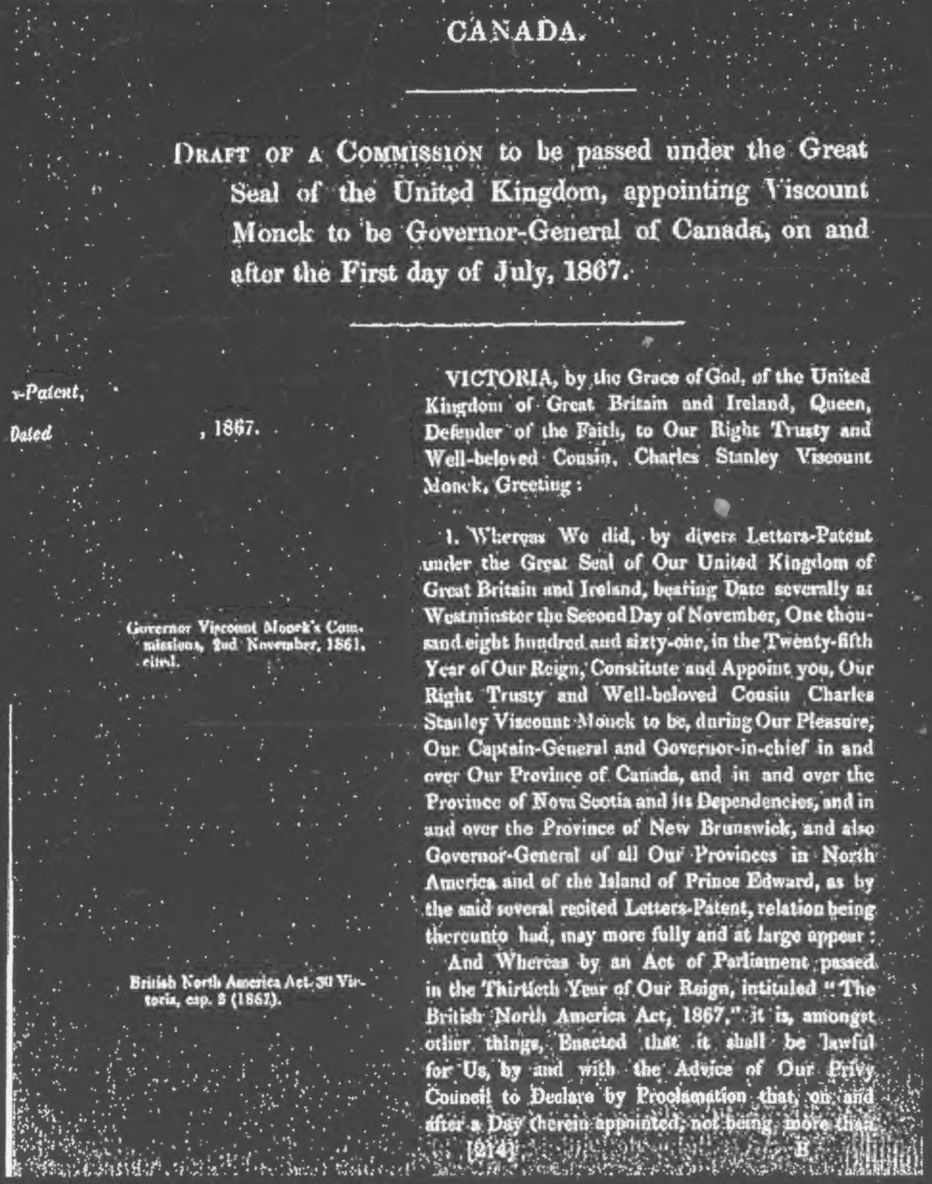
Appendix C

II. Letters Patent of the Governor-General of Canada, 1867.



CANADA.

Draft of a Commission to be passed under the Great Seal of the United Kingdom, appointing Viscount Monck to be Governor-General of Canada, on and after the First day of July, 1867.

-Patent,

Dated , 1867.

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to Our Right Trusty and Well-beloved Cousin, Charles Stanley Viscount Monck, Greeting:

Governor Viscount Monck's Commissions, 2nd November, 1861, cited.

1. Whereas We did, by divers Letters-Patent under the Great Seal of Our United Kingdom of Great Britain and Ireland, bearing Date severally at Westminster the Second Day of November, One thousand eight hundred and sixty-one, in the Twenty-fifth Year of Our Reign, Constitute and Appoint you, Our Right Trusty and Well-beloved Cousin Charles Stanley Viscount Monck to be, during Our Pleasure, Our Captain-General and Governor-in-chief in and over Our Province of Canada, and in and over the Province of Nova Scotia and its Dependencies, and in and over the Province of New Brunswick, and also Governor-General of all Our Provinces in North America and of the Island of Prince Edward, as by the said several recited Letters-Patent, relation being thereunto had, may more fully and at large appear:

British North America Act, 30 Victoria, cap. 3 (1867).

And Whereas by an Act of Parliament passed in the Thirtieth Year of Our Reign, intituled "The British North America Act, 1867," it is, amongst other things, Enacted that it shall be lawful for Us, by and with the Advice of Our Privy Council to Declare by Proclamation that, on and after a Day therein appointed, not being more than

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Six Months after the passing of the said Act, the Provinces of Canada, Nova Scotia, and New Brunswick, shall form and be One Dominion under the Name of Canada; and on and after that Day those Three Provinces shall form and be One Dominion under that Name accordingly, and that Canada shall be Divided into Four Provinces, named Ontario, Quebec, Nova Scotia, and New Brunswick:

Proclamation of Union dated the 22nd of May, 1867. The Union to take effect on the 1st July, 1867.

And Whereas We did on the Twenty-second Day of May, One thousand eight hundred and sixty-seven, by and with the Advice of Our Privy Council, Declare by Proclamation that on and after the First Day of July, One thousand eight hundred and sixty-seven, being within Six Months after the passing of the said Act, the Provinces of Canada, Nova Scotia, and New Brunswick, should form and be One Dominion, under the Name of Canada:

Revocation of Governor Viscount Monck's Commissions of 2nd November 1861 on the 1st July 1867.

Now know you that We do by these Presents Declare Our Pleasure to be that the said recited Letters-Patent, and every Clause, Article, and Thing therein contained, shall be and they are hereby declared to be Revoked and Determined on the said First Day of July, One thousand eight hundred and sixty-seven;

Appointment of Viscount Monck as Governor, on the 1st July 1867.

And further Know you that We, reposing especial Trust and Confidence in the Prudence, Courage, and Loyalty of you, the said Charles Stanley Viscount Monck, of Our special Grace, certain Knowledge, and mere Motion, have thought fit to Constitute and Appoint, and do by these Presents Constitute and Appoint you to be, on and after the said First Day of July, One thousand eight hundred and sixty-seven, during Our Pleasure, Our Governor-General of Canada; and We do hereby Authorize, Empower, Require, and Command you thereafter in due manner to Do and Execute all Things that shall belong to your said Command, and the Trust We have reposed in you, according to the several Powers, Provisions, and Directions granted or appointed you by virtue of this Our Commission, and of the said recited Act of Parliament, and according to such Instructions as are herewith given to you, or which may from time to time hereafter be given to you in respect of the said Dominion of Canada, under Our Sign-Manual and Signet, or by Our Order in Our Privy Council, or by Us through One of Our Principal Secretaries of State, and according to such Laws as are or shall be in force within Our said Dominion.

Great Seal.

II. And We do hereby Authorize and Empower you to keep and use the Great Seal of Canada, for the Sealing of all Things whatsoever that shall Pass the said Seal.

Governor empowered to Appoint Judges and other Officers.

III. And We do further Authorize and Empower you to exercise all such Powers as We may be at any time entitled to exercise in respect of the Constitution and Appointment of Judges, and in cases requisite Commissioners of Oyer and Terminer, Justices of the Peace, and other necessary Officers and Ministers of Our said Dominion of Canada, for the better Administration of Justice, and putting the Laws into Execution.

Power of Suspension of Officers

IV. And We do hereby Give and Grant unto you, so far as We lawfully may, full Power and Authority, upon sufficient cause to you appearing, to Remove from his Office, or to Suspend from the exercise of the same, any Person exercising any Office or Place within our said Dominion, under or by virtue of any Commission or Warrant granted, or which may be granted by Us in Our Name, or under Our Authority.

Power of Pardon.

V. And We do hereby Give and Grant unto you full Power and Authority, when you shall see cause, in Our Name and on Our Behalf to Grant to any Offender Convicted of any Crime in any Court, or before any Judge, Justice, or Magistrate within Our said Dominion, a Pardon, either Free or Subject to Lawful Conditions, or any Respite of the Execution of the Sentence of any such Offender for such period as to you may seem fit and to Remit any Fines, Penalties, or Forfeitures which may become Due and Payable to Us.

Power of Assembling or Proroguing the House of Commons.

VI. And We do hereby Authorize you to Exercise from time to time, as you may judge necessary, all Powers belonging to Us, in respect of Assembling, or Proroguing, the Senate or the House of Commons of Our said Dominion, and of Dissolving the said House of Commons, and We do hereby give the like Authority to the several Lieutenant-Governors for the time being, of the Four Provinces in Our said Dominion with respect to the Legislative Councils or the Legislative or General Assemblies of those Provinces respectively.

VII. And We do by these Presents Authorize and Empower you, within Our said Dominion, to Exercise all such Powers as We may be entitled to exercise therein in respect of Granting Licenses for Marriages, Letters of Administration, and Probates of Wills, and with respect to the Custody and Management of Idiots and Lunatics, and their Estates; and to Present any Person or Persons to any Churches, Chapels, or other Ecclesiastical Benefices within Our said Provinces of Nova Scotia and New Brunswick, to which we shall from time to time be entitled to Present.

Power of granting Marriage Licenses and Probates of Wills: Custody of Idiots: Presentations to Ecclesiastical Benefices.

VIII. And Whereas by the said recited Act, it is amongst other things Enacted, that it shall be lawful for us, if We think fit, to Authorize the Governor-General of Canada to Appoint any Person or Persons jointly or severally to be his Deputy or Deputies within any Part or Parts of Canada, and in that capacity to Exercise, during the Pleasure of the Governor-General, such of the Powers, Authorities, and Functions of the Governor-General as he may deem it necessary or expedient to assign to him or them, subject to any Limitations or Directions from time to time expressed or given by Us: Now We do hereby Authorize and Empower you, subject to such Limitations and Directions as aforesaid, to appoint any Person or Persons, jointly or severally, to be your Deputy or Deputies within any Part or Parts of our Dominion of Canada, and in that capacity to Exercise, during your Pleasure, such of your Powers, Functions, and Authorities as you may deem it necessary or expedient to assign to him or them: Provided always, that the Appointment of such a Deputy or Deputies shall not affect the Exercise of any such Power, Authority, or Function by you, the said Charles Stanley Viscount Monck, in person.

Power to appoint Deputies.

IX. And in case of your Death, Incapacity, or Absence out of Our said Dominion of Canada, We

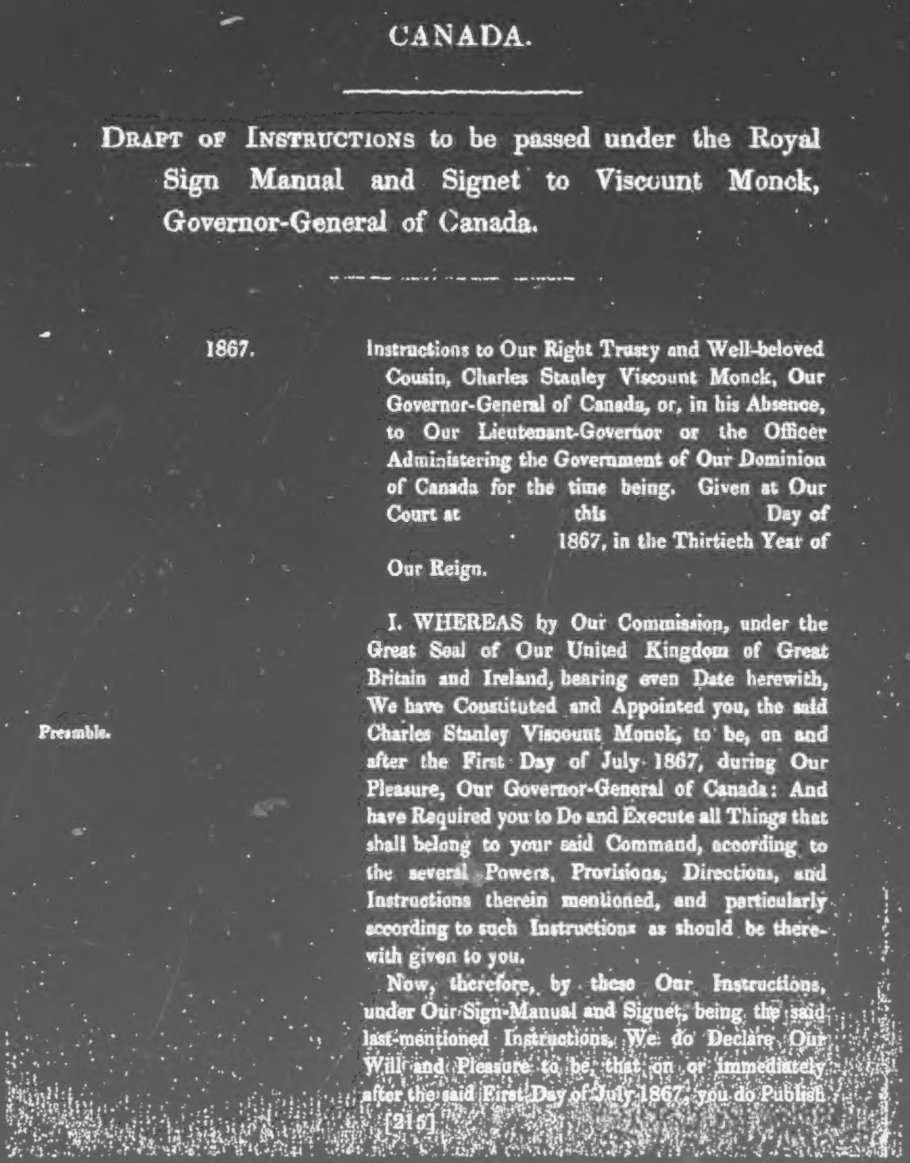
Temporary Administration of the Government.

do by these Presents Give and Grant all and singular the Powers and Authorities herein to you granted to Our Lieutenant-Governor for the time being of Our said Dominion of Canada, or in the Absence of any such Lieutenant-Governor to such Person as We may by Warrant under Our Sign-Manual and Signet appoint to be the Administrator of the Government of Our said Dominion, or in the Absence of any such Lieutenant-Governor or Person as aforesaid to the Senior Military Officer for the time being in Command of Our Regular Forces in Our said Dominion, such Powers and Authorities to be by him Executed and Enjoyed during Our Pleasure.

Officers and Others to obey and assist the Governor.

X. And We do hereby Require and Command all Our Officers and Ministers, Civil and Military, and all other the Inhabitants of Our said Dominion of Canada, to be Obedient, Aiding, and Assisting unto you in the Execution of this Our Commission, and of the Powers and Authorities herein contained.

III. Draft Instructions to the General-General of Canada, 24 May, 1867. From *Early Canadiana On-line,* <http:// www.canadiana.org/>.



CANADA.

DRAFT OF INSTRUCTIONS to be passed under the Royal Sign Manual and Signet to Viscount Monck, Governor-General of Canada.

1867.

Instructions to Our Right Trusty and Well-beloved Cousin, Charles Stanley Viscount Monck, Our Governor-General of Canada, or, in his Absence, to Our Lieutenant-Governor or the Officer Administering the Government of Our Dominion of Canada for the time being. Given at Our Court at this Day of 1867, in the Thirtieth Year of Our Reign.

Preamble.

I. WHEREAS by Our Commission, under the Great Seal of Our United Kingdom of Great Britain and Ireland, bearing even Date herewith, We have Constituted and Appointed you, the said Charles Stanley Viscount Monck, to be, on and after the First Day of July 1867, during Our Pleasure, Our Governor-General of Canada: And have Required you to Do and Execute all Things that shall belong to your said Command, according to the several Powers, Provisions, Directions, and Instructions therein mentioned, and particularly according to such Instructions as should be therewith given to you.

Now, therefore, by these Our Instructions, under Our Sign-Manual and Signet, being the said last-mentioned Instructions, We do Declare Our Will and Pleasure to be, that on or immediately after the said First Day of July 1867, you do Publish

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Our said Commission in Our Dominion of Canada, and do take the Oath appointed to be taken by an Act passed in the Twenty-first and Twenty-second Year of Our Reign, intituled "An Act to substitute "one Oath for the Oaths of Allegiance, Supremacy, "and Abjuration, and for the Relief of Her "Majesty's Subjects Professing the Jewish Reli-"gion;" and likewise that you take the usual Oath for the due Execution and Performance of the Office and Trust of Our Governor-General of Our said Dominion, and for the due and impartial Administion of Justice; which said Oaths the Judges of Our Supreme Courts of Record within Our said Dominion, or any Three or more of such Judges, have hereby full Power and Authority, and are Required to Tender and Administer unto you.

Publication of Commission on 1st July 1867.

Oaths to be taken by the Governor.

II. And We do hereby Give and Grant unto you full Power and Authority from time to time, and at any time hereafter, by yourself or by any other Person to be Authorized by you in that behalf, to Administer to all and every Person or Persons as you shall think fit, who shall hold any Office or Place of Trust or Profit, or who shall at any time or times pass into Our said Dominion of Canada, or who shall be Resident or Abiding therein, the Oath commonly called the Oath of Allegiance, together with such other Oath or Oaths as may from time to time be Prescribed by any Laws or Statutes in that behalf made and provided.

Governor to Administer Oaths of Office.

III. And to the end that Our Privy Council for Canada may be Assisting to you in all affairs relating to Our Service, you are to communicate to them these Our Instructions, and any Additional Instructions which may be in like manner hereafter given to you by Us.

Governor to communicate Instructions to Privy Council.

IV. And We do hereby Declare, and it is Our Pleasure, that Our said Privy Council shall not proceed to the Dispatch of Business unless duly Summoned by your Authority, nor unless Four Members of the said Council be Present and Assisting at any Meetings at which any such Business shall be dispatched. And We do further Direct, that if in any case you see sufficient cause to

Council not to proceed to Business unless Summoned.

Quorum.

Governor may act in opposition to the Council.

Members may record on Minutes their adverse opinions.

Dissent from the Opinion of the major part or of the whole of Our said Privy Council so present, it shall be competent to you to Execute the Powers and Authorities vested in you by Our said Commission, and by these Our Instructions, in Opposition to such their Opinion; it being, Nevertheless, Our Pleasure, that in every case it shall be competent to any Member of Our said Privy Council to Record at length, on the Minutes of Our said Council, the Grounds and Reasons of any Advice or Opinion he may give upon any Question brought under the consideration of such Council.

Appointment and Removal of President.

V. And it is Our Pleasure and you are hereby Authorized to Appoint by an Instrument under the Great Seal of Canada, one Member of Our said Privy Council to Preside in your Absence, and to Remove him and Appoint another in his stead. And if during your Absence the Member so Appointed shall also be absent, then the Senior Member of the Privy Council actually present shall Preside, the Seniority of the Members of the said Council being regulated according to the Date or Order of their respective Appointment thereto.

Journals and Minutes to be kept.

VI. And We do further Direct and Command that a full and exact Journal or Minute be kept of all the Deliberations, Acts, Proceedings, Votes, and Resolutions of Our said Privy Council; and that at each Meeting of the said Council the Minutes of the last preceding Meeting shall be Read over, Confirmed, or Amended, as the case may require before proceeding to the Dispatch of any other Business.

Assent to Bills.

VII. And for the execution of so much of the Powers vested in you by virtue of the "British North America Act, 1867," as relates to the Declaring either that you Assent in Our Name to Bills passed by the Houses of the Parliament, or that you withhold Our Assent therefrom, or that you Reserve such Bills for the Signification of Our Pleasure thereon, it is Our Will and Pleasure that when any Bill is presented to you for Our Assent, of either of the Classes hereinafter specified, you shall (unless you shall think proper to withhold Our

Assent from the same) Reserve the same for the Signification of Our pleasure thereon; Subject, Nevertheless, to your discretion, in case you should be of opinion that an Urgent Necessity exists, requiring that such Bill be brought into Immediate Operation; in which case you are Authorized to Assent to such Bill in Our Name, transmitting to Us by the earliest opportunity the Bill so Assented to, together with your Reasons for Assenting thereto; that is to say:

Bills to be reserved.

1. Any Bill for the Divorce of Persons joined together in Holy Matrimony.
2. Any Bill whereby any Grant of Land or Money, or other Donation or Gratuity, may be made to yourself.
3. Any Bill whereby any Paper or other Currency may be made a Legal Tender, except the Coin of the Realm or other Gold or Silver Coin.
4. Any Bill imposing Differential Duties.
5. Any Bill, the Provisions of which shall appear inconsistent with Obligations imposed upon Us by Treaty.
6. Any Bill interfering with the Discipline or Control of Our Forces in Our said Dominion by Land and Sea.
7. Any Bill of an Extraordinary Nature and Importance, whereby Our Prerogative, or the Rights and Property of Our Subjects not Residing in Our said Dominion, or the Trade and Shipping of the United Kingdom and its Dependencies, may be Prejudiced.
8. Any Bill containing Provisions to which Our Assent has been once Refused, or which has been Disallowed by Us.

Laws to be sent home.

VIII. You shall take care that all Laws Assented to by you in Our Name, or Reserved for the Signification of Our Pleasure thereon, be duly transmitted to Us with such Explanatory Observations as the nature of each Law may require, and you are also to transmit fair Copies of the Journals and Minutes of the Proceedings of the said Houses of the Parliament, which you are to require from the Clerks or other proper Officers in that behalf of the said Houses of the Parliament.

IX. And Whereas We have by Our said Commis- [illegible]

Power of Pardon: Regulation of.

sion Given and Granted unto you full Power and Authority, when you shall see cause, to Pardon Offenders Convicted of any Crime, and to Remit Fines, Penalties, and Forfeitures: Now We do hereby Enjoin you to call upon the Judge presiding at the Trial of any Offenders to make to you a Written Report of the Cases of all Persons who may from time to time be Condemned to suffer Death by the Sentence of any Court within Our said Dominion, and such Reports of the said Judge shall by you be taken into consideration at the First Meeting thereafter which may be conveniently held of Our said Privy Council for Canada; and you shall not Pardon any such Offender unless it shall appear to you expedient so to do, upon receiving the Advice of Our said Privy Council therein, but in all such cases you are to decide whether to extend or withhold a Pardon, according to your own deliberate judgment whether the Members of Our said Privy Council concur therein, or otherwise; Entering, Nevertheless, on the Minutes of the said Council, a Minute of your Reasons at length, in case you should decide any such Question in Opposition to the judgment of the Majority of Members thereof.

Appointments to be during Pleasure.

X. It is Our further Will and Pleasure that all Commissions to be granted by you to any Person or Persons to be Judge, Justice of the Peace, or other necessary Officer, unless otherwise provided by Law, be granted during Our Pleasure only.

Appointments to Benefices.

XI. And Whereas by Our said Commission We have Authorized you to Present any Person or Persons to any Church, Chapel, or other Ecclesiastical Benefice, within Our said Provinces of Nova Scotia and New Brunswick, to which We may from time to time be entitled to Present, We do Declare Our Will and Pleasure to be that you do not Present any Minister of the United Church of England and Ireland to any Ecclesiastical Benefice without a Certificate from the Bishop for the time being of the Diocese in which such Presentation is made, or his Commissary, of his being conformable to the doctrine and discipline of the said Church. And it is Our Will and Pleasure that the Person so Presented shall be Instituted by the said Bishop, or his Commissary duly Authorized by him.

XII. And Whereas you will receive through one of Our Principal Secretaries of State a Book of Tables in blank (commonly called the "Blue Book"), to be Annually filled up with certain Returns relative to the Revenue and Expenditure, Militia, Public Works, Legislation, Civil Establishment, Pensions, Population, Schools, Course of Exchange, Imports and Exports, Agricultural Produce, Manufactures, and Other Matters in the said "Blue Book" more particularly specified, with reference to the State and Condition of Our said Dominion of Canada: Now We do hereby signify Our Pleasure that all such Returns be accurately Prepared and punctually Transmitted to Us through One of Our Principal Secretaries of State.

Blue Book.

XIII. And Whereas great Prejudice may happen to Our Service and to the Security of Our said Dominion by the Absence of the Governor-General, you shall not, upon any pretence whatever, Quit the said Dominion without having first obtained Leave from Us for so doing, under Our Sign-Manual and Signet, or through one of Our Principal Secretaries of State.

Governor's Absence

Appendix D

I. Use of terms "Peace, Welfare, and Good Government" and "Peace, Order, and Good Government" in Statutory Colonial Australian Constitutions, 1823 - 1867

Between 1823 and 1867, the Imperial Parliament passed ten statutory colonial constitutions for various colonies in Australia. Of these the *New South Wales Act, 1823*, the *Constitution Act, 1855* (Tasmania), *New South Wales Constitution Act, 1855*, and the *Constitution Act, 1867* (Queensland) exclusively used the term "Peace, Welfare, and Good Government." The *New South Wales Constitution Act, 1842* and the *Australia Colonies Government Act, 1851* used both the terms "Peace, Welfare, and Good Government" and "Peace, Order, and Good Government." "Peace, Order, and Good Government" is the exclusively used term in the *Western Australia Act, 1829* as well as the *South Australia Act, 1834* and "Order and Good Government" is used exclusively in the *Northern Territory Act, 1863*.

Overall, the term PWGG is the preferred term in statutory colonial Australian constitutions. The occasions where PWGG and POGG were used variously in the same document PWGG was used to refer to a specific colony whereas POGG is used to refer collectively to existing colonies or colonies to be created; as well the *South Australia Act, 1834* also uses POGG only in the context of referring collectively to (potential) multiple colonies. In the *Western Australia Act, 1829*, where POGG is used exclusively is an Act which specifically proclaims that its duration is temporary. The *Northern Territory Act, 1863* does use the term "Order and Good Government," but this Act does not create a legislature for the territory and does not enable the passage of laws, but merely enables an officer, the "Government Resident" to secure "the order and good government of the said territory." There is, however, one exception, where the *South Australia Act, 1842* used the term POGG, but in the manner the PWGG was used in all the other statutory colonial Australian constitutions.

Thus, in general, the term "Peace, *Welfare*, and Good Government" is used to describe the grant of plenary legislative authority to specific, established colonies where as the term "Peace, *Order*, and Good Government" was used in either temporary acts or to refer to colonies collectively. It therefore appears that the use of POGG seems to simply convey that legislative power has been conceded in some form, whereas the use of the term PWGG is the specific grant of fully plenary powers to a colonial legislature.

Appendix D

II. Selections from Statutory Colonial Australian Constitutions, 1823 - 1867

New South Wales Act, 1823 4 George IV, c. 96 (UK)

> And whereas it may be necessary to make laws and ordinances for the **welfare and good government** of the said colony of New South Wales and the dependencies thereof the occasions of which cannot be foreseen nor without much delay and inconvenience be provided for without entrusting that authority for a certain time and under proper restrictions to persons resident there and whereas it is not at present expedient to call a legislative assembly in the said colony
>
> Be it therefore enacted that it shall and may be lawful for his Majesty his heirs and successors by warrant under his or their sign manual to constitute and appoint a council to consist of such persons resident in the said colony not exceeding seven nor less than five as his Majesty his heirs and successors shall be pleased to appoint and upon the death removal or absence of any of the members of the said council in like manner to constitute and appoint such and so many other person or persons as shall be necessary to supply the vacancy or vacancies and the governor or acting governor for the time being of the said colony with the advice of the council to be appointed as aforesaid or the major part of them shall have power and authority to make laws and ordinances for the **peace welfare and good government** of the said colony such laws and ordinances not being repugnant to this act or to any charter or letters patent or order in council which may be issued in pursuance hereof or to the laws of England but consistent with such laws so far as the circumstances of the said colony will admit provided always that no law or ordinance shall be passed or made unless the same shall first by the said governor or acting governor be laid before the said council at a meeting to be for that purpose convened by a written summons under the hand of such governor or acting governor to be delivered to or left at the usual place of abode of the members of such council respectively provided also that in case all or the major part of the members of the said council shall dissent from any law or ordinance proposed by such governor or acting governor at any such meeting as aforesaid the members of the said council so dissenting shall enter upon the minutes of such council the grounds and reasons of such their dissent and in every such case such proposed law or ordinance shall not pass into a law provided nevertheless that if it shall appear to the governor or acting governor for the time being of the said colony that such proposed law or ordinance is essential to the peace and safety thereof and cannot without extreme injury to the **welfare and good government** of the said colony be rejected then and in every such case if any one or more member or members of the said council shall assent to such proposed law the said Governor shall enter upon the minutes of the council the grounds and reasons of such his opinion and in every such case and until the pleasure of his Majesty his heirs and successors shall be made known in the said colony respecting the same such law or ordinance shall be of full force and effect in the said colony and the dependencies thereof any such dissent as aforesaid of majority of the members of the said council notwithstanding

Western Australia Act, 1829 10 George IV, no. 63 (UK)

> Be it therefore enacted by the King most excellent Majesty by and with the advice and consent of the Lords (?) and temporal and (?) in this present parliament assembled and by the authority of the same that it shall and may be lawful for His Majesty his heirs and successors by any order or orders to be by him or them made with the advice of his of their privy council to make ordain and subject to such conditions and constitutions as to him or them shall seem (fit?) to authorize and empower any three or more persons and being within the said settlements to make ordain and establish all such laws instructions and ordinances and to constitute such courts and officers as may be necessary for the **peace order and good government** of His Majesty's subjects and others within the said settlements provided that all such orders in council and all laws and ordinances so to be made as aforesaid the shall be laid before both houses of parliament as soon as conveniently may be after the making and enactment thereof (?) provided also that as part of the colonies of New South Wales and Van Dieman's Land as at present established shall be (?) within the said new colony or settlements of Western Australia and be it further enacted that this act shall continue in force until the thirty first day of December one thousand eight hundred and thirty four and (?) (?) until the end of the then (?) session of parliament and no longer.

South Australia Act, 1834 4 & 5 William IV, c.95 (UK)[21]

> And be it further enacted that it shall and may be lawful for his majesty his heirs and successors by any order or orders to be by him or them made with the advice of his of their privy council to make ordain and subject to such conditions and restrictions as to him and them shall seem meet to authorize and empower any one or more persons resident and being within ^ any one of ^ the said ~~xxxxxxx~~ ^ provinces ^ to make ordain and establish all such laws institutions or ordinances and to constitute such courts, and appoint such officers ^ and also such Chaplains and Clergymen of the Established Church of England or Scotland ^ and to impose and levy such rates duties, and taxes as may be necessary for the **peace order and good government** of his majesty's subjects and others within the said province ^ or provinces ^ provided that all such orders ~~xxxxxx~~ and all laws and ordinances so to be made as aforesaid shall be laid before ~~xxxxxxxxxxxxxxxxx~~ ^ the King in Council ^ as soon as conveniently may be after the making and enacting thereof respectively and that the same shall not in anywise be contrary or repugnant to any of the provisions of this act

New South Wales Constitution Act, 1842 5 & 6 Victoria, c. 76 (UK)

> And be it enacted that the governor of the said colony of New South Wales with the advice and consent of the said legislative council shall have authority to make laws for the **peace welfare and good government** of the said colony provided always that no such law shall be repugnant to the law or England or interfere in any manner with the sale

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[21] <.......> signifies scope notes in small type in the margins.

Additional Text ^ text ^
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or other appropriation of the lands belonging to the Crown within the said colony or with the revenue thence arising

And be it enacted that in case her Majesty shall by any such letters patent as aforesaid establish any such new colony or coloies as aforesaid it shall be lawful for her majesty by any such letters patent to authorise any number of persons not loss than seven including the governor or Lieutenant governor of any such new colony or Colonies to constitute a legislative council or' legislative councils for the same; and that every such Legislative council shall be composed of such persons as shall from time to be named or designated by her majesty for that purpose and shall hold their places therein at her majesty's pleasure ; and that it shall be lawful for such legislative council to make and ordain all such ordinances as may be required for the **peace order and good government** of any such colony as aforesaid for which such legislative council may be so appointed and that in the making all such ordinances the said legislative council shall conform to and observe all such instructions as her majesty with the advice of her privy council shall from time to time make for their guidance therein provided always that no such instructions and that no such ordinances as aforesaid shall be repugnant to the law of England but consistent therewith so far as the circumstances of any such colony may admit provided also that all such ordinances shall be subject o her majesty's confirmation or disallowance in such manner and according to such regulations as her majesty by any such instructions as aforesaid shall from time to time see fit to prescribe provided also that all instructions which shall in pursuance hereof be made by her majesty with the advice of her privy council and that all ordinances which shall be made in pursuance hereof by any such legislative council of any such newly created colony as last aforesaid shall be laid before both houses of parliament within one calendar month from the date of any such instructions or from the arrival in this Kingdom of the transcripts of any such ordinances if parliament shall then be sitting or if not then within one calendar month from the commencement of the next ensuing session of parliament

South Australia Act, 1842 5 & 6 Victoria, c.61 (UK)

And be it enacted that it shall be lawful for her majesty by any commission or commissions to be by her majesty from time to Time issued under the great seal of the united kingdom or by any instructions under her majesty's signet and sign manual to be from time to time issued with the advice of her majesty's privy council to constitute within the said colony a legislative council consisting of the governor and of seven other persons at the least which legislative council shall be authorized to make laws for the **peace order and good government** of the said colony and it shall be lawful for her majesty by any such commission or commissions or instructions as aforesaid either to appoint such councillors by name or otherwise to provide for the selection and appointment of them as to her majesty shall seem meet and it shall also be lawful for her majesty in manner aforesaid to prescribe all such rules and orders as to her majesty shall seem meet respecting the tenure of the offices of such councillors and respecting the course and manner of proceeding to be by the said legislative council observed in the enactment of laws and respecting the transmission of such laws for the confirmation or disallowance of her majesty or the reservation of them for the signification of her majesty's pleasure and respecting the effect of any such disallowance or reservation all which rules and orders shall within the said colony have the force and effect of law until the same shall have been revoked or altered by her majesty in manner aforesaid

And be it enacted that it shall be lawful for her majesty by any such commission or commissions or instructions as aforesaid to convene a general assembly to be elected by freeholders and other inhabitants of the said colony in such and the same manner as if this act and the said recited acts had not been passed and to authorize the governor for the time being of the said colony with the advice and consent of the said general assembly and of a legislative council to be by her majesty for that purpose appointed to make laws for the **peace order and good government** of the said colony or it shall be lawful for her majesty in manner aforesaid to constitute a general assembly for the purposes aforesaid consisting of a single house of general assembly alone which one house of general assembly shall be composed in such proportions as to her majesty may seem meet of members to be nominated by her majesty and of other members to be elected by such freeholders or other inhabitants and it shall be lawful for her majesty by any such commission or commissions or instructions aforesaid to establish such rules and orders as to her majesty shall seem meet for the nomination or election of the members of the said general assembly as the case may be and to determine how and where such election shall be holden and for that purpose to divide or to provide for the division of the said colony into electoral districts and to determine what shall be the qualification of the persons so to be elected and of the voters at any such elections and to regulate all other things for which it may be expedient to provide in order to the meeting of any such general assembly and it shall also be lawful for her majesty by any such commission or instructions as aforesaid to reserve to the governor of the said colony the exclusive right of initiating all votes of public money in such general assembly and to establish all such rules and orders in reference to any laws to be made by the said general assembly as are hereinbefore mentioned in reference to any laws to be made by the said legislative council

Be it enacted that it shall be lawful for the lord high treasurer or the commissioners of her majesty's treasury of the united kingdom of Great Britain and Ireland for the time being or any three or more of them if he or they shall be satisfied that the general revenue of the said province of South Australia is insufficient (after defraying the necessary costs and charges of the civil government and of the due administration of justice and the maintenance of **peace order and good government** therein) for the payment of the interest or annuities upon the said sums secured or covenanted to be paid by the said bonds or writings obligatory or any part thereof to authorize and direct the issue out of the consolidated fund of the united kingdom of Great Britain and Ireland or out of the growing produce of the said fund to such person or persons as they shall appoint...

Australia Colonies Government Act, 1851 13 & 14 Victoria, c. 59 (UK)

And whereas by an Act passed in the Tenth year of the Reign of His late Majesty King *George* the Fourth, intituled *An Act to provide until the Thirty-first Day of* December *One thousand eight hundred and thirty-four for the Government of His Majesty's Settlements in* Western Australia *on the Western Coast of* New Holland, His said Majesty, His Heirs and Successors, with the Advice of His or their Privy Council, were empowered to make, ordain, and (subject to such Conditions and Restrictions as to him or them should seem meet) to authorize and empower any Three or more Persons resident and being within the said Settlements to make, ordain, and constitute, Laws, Institutions, and Ordinances for the **Peace, Order, and good Government** of His Majesty's Subjects and others within the said Settlements :

> XIV. And be it enacted, That the Governors of the said Colonies of *Victoria, Van Diemen's Land, South Australia,* and *Western Australia* respectively, with the Advice and Consent of the Legislative Councils to be established in the said Colonies under this Act, shall have Authority to make Laws for the **Peace, Welfare, and good Government** of the said Colonies respectively, and, with the Deductions and subject to the Provisions herein contained, by such Laws to appropriate to the public Service within the said Colonies respectively the whole of Her Majesty's Revenue within such Colonies arising from Taxes, Duties, Rates, and Imposts levied on Her Majesty's Subjects within such Colonies : Provided always, that no such Law shall be repugnant to the Law of *England,* or interfere in any Manner with the Sale or other appropriation of the Lands belonging to the Crown within any of the said Colonies, or with the Revenue thence arising; and that it shall not be lawful for any such Council to pass, or for any such Governor to assent to, any Bill appropriating to the public Service any Sums or Sum of money, unless the Governor on Her Majesty's Behalf shall first have recommended to the Council to make Provision for the specific public Service towards which such Money is to be appropriated; and that no part of Her Majesty's Revenue in any of the said Colonies arising from the Sources aforesaid shall be issued, or shall be made by any such Law issuable, except in pursuance of Warrants under the Hand of the Governor of the Colony, directed to the public Treasurer thereof.

Constitution Act, 1855 (Tasmania) 18 Victoria, no. 17 (UK)

> And whereas it is expedient for securing the **peace welfare and good government** of this Colony for the Governor and Legislative Council to exercise the powers given to them by the Imperial Act for the purpose of vesting the powers and functions of the Legislative Council of this Colony in a Legislative Council and House of Assembly to be constituted in manner hereinafter mentioned

New South Wales Constitution Act, 1855 18 & 19 Victoria, no. 183 (UK)

> I. There shall be, in place of the Legislative Council now subsisting, One Legislative Council and One Legislative Assembly, to be severally constituted and composed in the Manner herein-after prescribed; and within the said Colony of New South Wales Her Majesty shall have Power, by and with the Advice and Consent of the said Council and Assembly, to make Laws for the **Peace, Welfare, and good Government** of the said Colony in all Cases whatsoever: Provided, that all Bills for appropriating any Part of the Public Revenue, for imposing any new Rate, Tax, or Impost, subject always to the Limitation contained in Clause Sixty-two of this Act, shall originate in the Legislative Assembly of the said Colony.

Northern Territory Act, 1863 26 & 27 Victoria, no. 23 (UK)

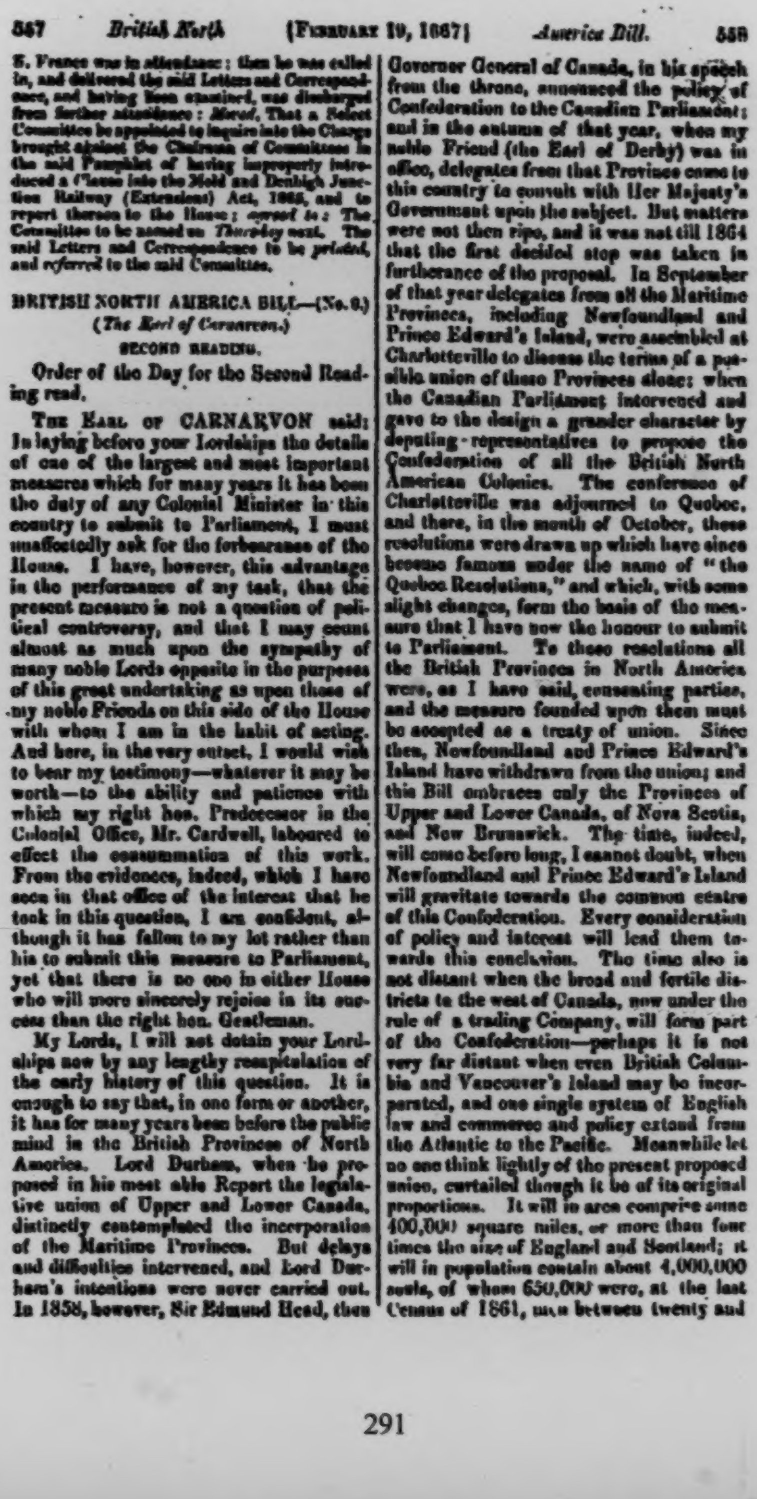
> 12. The Governor with the advice and consent of the Executive Council, may, from time to time, appoint an officer to be resident in the said territory, to be called the Government Resident, and all other necessary and proper officers for securing the **order and good government** of the said territory, and may remove such Government Resident or other officers at discretion, and may assign and pay to them such salaries and emoluments as he may determine.

Constitution Act, 1867 (Queensland) 30 & 31 Victoria, c. 3 (UK)

2. Within the said Colony of Queensland Her Majesty shall have power by and with the advice and consent of the said Council and Assembly to make laws for the **peace welfare and good government** of the colony in all cases whatsoever Provided that all Bills for appropriating any part of the public revenue for imposing any new rate tax or impost subject always to the limitations hereinafter provided shall originate in the legislative Assembly of the said colony.

Appendix E

I. Speech of Lord Carnarvon in the House of Lords; Second Reading of the British North America Bill (No. 9), February 19, 1867, pp. 557-576b.



557 *British North* [FEBRUARY 19, 1867] *America Bill.* 558

E. France was in attendance: then he was called in, and delivered the said Letters and Correspondence, and having been examined, was discharged from further attendance: *Moved*, That a Select Committee be appointed to inquire into the Charge brought against the Chairman of Committees in the said Pamphlet of having improperly introduced a Clause into the Mold and Denbigh Junction Railway (Extension) Act, 1866, and to report thereon to the House; *agreed to*: The Committee to be named on *Thursday* next. The said Letters and Correspondence to be *printed*, and *referred* to the said Committee.

BRITISH NORTH AMERICA BILL—(No. 9.)

(*The Earl of Carnarvon.*)

SECOND READING.

Order of the Day for the Second Reading read.

THE EARL OF CARNARVON said: In laying before your Lordships the details of one of the largest and most important measures which for many years it has been the duty of any Colonial Minister in this country to submit to Parliament, I must unaffectedly ask for the forbearance of the House. I have, however, this advantage in the performance of my task, that the present measure is not a question of political controversy, and that I may count almost as much upon the sympathy of many noble Lords opposite in the purposes of this great undertaking as upon those of my noble Friends on this side of the House with whom I am in the habit of acting. And here, in the very outset, I would wish to bear my testimony—whatever it may be worth—to the ability and patience with which my right hon. Predecessor in the Colonial Office, Mr. Cardwell, laboured to effect the consummation of this work. From the evidences, indeed, which I have seen in that office of the interest that he took in this question, I am confident, although it has fallen to my lot rather than his to submit this measure to Parliament, yet that there is no one in either House who will more sincerely rejoice in its success than the right hon. Gentleman.

My Lords, I will not detain your Lordships now by any lengthy recapitulation of the early history of this question. It is enough to say that, in one form or another, it has for many years been before the public mind in the British Provinces of North America. Lord Durham, when he proposed in his most able Report the legislative union of Upper and Lower Canada, distinctly contemplated the incorporation of the Maritime Provinces. But delays and difficulties intervened, and Lord Durham's intentions were never carried out. In 1858, however, Sir Edmund Head, then Governor General of Canada, in his speech from the throne, announced the policy of Confederation to the Canadian Parliament; and in the autumn of that year, when my noble Friend (the Earl of Derby) was in office, delegates from that Province came to this country to consult with Her Majesty's Government upon the subject. But matters were not then ripe, and it was not till 1864 that the first decided step was taken in furtherance of the proposal. In September of that year delegates from all the Maritime Provinces, including Newfoundland and Prince Edward's Island, were assembled at Charlotteville to discuss the terms of a possible union of these Provinces alone: when the Canadian Parliament intervened and gave to the design a grander character by deputing representatives to propose the Confederation of all the British North American Colonies. The conference of Charlotteville was adjourned to Quebec, and there, in the month of October, these resolutions were drawn up which have since become famous under the name of "the Quebec Resolutions," and which, with some slight changes, form the basis of the measure that I have now the honour to submit to Parliament. To these resolutions all the British Provinces in North America were, as I have said, consenting parties, and the measure founded upon them must be accepted as a treaty of union. Since then, Newfoundland and Prince Edward's Island have withdrawn from the union; and this Bill embraces only the Provinces of Upper and Lower Canada, of Nova Scotia, and New Brunswick. The time, indeed, will come before long, I cannot doubt, when Newfoundland and Prince Edward's Island will gravitate towards the common centre of this Confederation. Every consideration of policy and interest will lead them towards this conclusion. The time also is not distant when the broad and fertile districts to the west of Canada, now under the rule of a trading Company, will form part of the Confederation—perhaps it is not very far distant when even British Columbia and Vancouver's Island may be incorporated, and one single system of English law and commerce and policy extend from the Atlantic to the Pacific. Meanwhile let no one think lightly of the present proposed union, curtailed though it be of its original proportions. It will in area comprise some 400,000 square miles, or more than four times the size of England and Scotland; it will in population contain about 4,000,000 souls, of whom 650,000 were, at the last Census of 1861, men between twenty and sixty years of age, capable of bearing arms in defence of their country; and in revenue it possesses some £3,000,000.

The Bill opens by reciting the desire of the several Provinces to be federally united. It proceeds to invest the Crown with all Executive powers, by land and sea, for civil administration, and military defence. It proceeds to provide for the appointment of a Governor General—an officer charged with the duty of protecting Imperial interests, named by and responsible to the Crown. He will constitute the chief, if not the only, direct link by which the united Provinces will be connected with this country. His position will be one of dignity and station, equal in all ways to its Imperial importance, and a salary of £10,000 is by a clause in this Bill made a permanent third charge upon the general revenues. It is the desire of the Provinces to retain their separate and individual organization, and they will therefore be severally administered by Lieutenant Governors. At present these officers are appointed by the Crown; but henceforward they will receive their offices at the hands of the Governor General, acting under the advice of his Ministers. They will hold office during pleasure, though they will be subject to removal only on cause being shown, and under ordinary circumstances the term of their administration will be limited to five years.

I come now to the Legislature which it is proposed to create under this Bill. It is two-fold—a Central Parliament and Local Legislatures in each Province. I will deal with the Central Parliament first. It will be composed of two Chambers—an Upper Chamber, to be styled the Senate, and a Lower Chamber, to be termed, in affectionate remembrance of some of the best and noblest traditions of English history, the House of Commons. Of all problems to be solved in the creation of a Colonial Constitution, none is more difficult than the composition of an Upper House. This House is generally assumed to be the model—it would probably be hard to find a worthier or higher model—and men labour to re-produce the English House of Lords amongst English colonists, animated, it is true, by English instincts and feelings, but placed under social conditions which are wholly different. The materials for such a House are absolutely wanting in the colonies. The hereditary title to legislate, the great wealth, the large territorial property, the immemorial prescription, and the respect which has been for generations freely accorded to this ancient institution, have no place in the ideas of a young community. To attempt, therefore, a close and minute imitation of the English House of Lords is, I think, to court failure. There are, in my opinion, two broad principles to be kept in view in the creation of a Colonial Chamber: first, that it should be strong enough to maintain its own opinion, and to resist the sudden gusts of popular feeling; secondly, that it should not be so strong that it should be impenetrable to public sentiment, and therefore out of harmony with the other branch of the Legislature. These are conditions difficult under the most favourable circumstances to secure; but they are complicated in this instance by a third, which has been made a fundamental principle of the measure by the several contracting parties, and the object of which is to provide for a permanent representation and protection of sectional interests. I will briefly explain how far these three considerations appear to me to have been met in this Bill. The Senate will consist of seventy-two Members, the four Provinces being for this purpose divided into three sections, of which Upper Canada will be one, Lower Canada one, and the Maritime Provinces one. From each of these three sections an equal number of twenty-four Members will be returned. They will be nominated by the Governor General in Council for life. But as it is obvious that the principle of life nomination, combined with a fixed number of Members, might render a difference of opinion between the two Houses a question almost insoluble under many years, and might bring about what is popularly known as a Legislative dead-lock, a power is conferred upon the Crown—a power, I need not say, that would only be exercised under exceptional and very grave circumstances—to add six Members to the Senate, subject to a restriction that those six Members shall be taken equally from the three sections, so as in no way to disturb their relative strength, and that the next vacancies shall not be filled up until the Senate is reduced to its normal number. It may, perhaps, be said that the addition of six Members will be insufficient to obviate the Legislative discord against which we desire to provide. I am free to confess that I could have wished that the margin had been broader. At the same time, the average vacancies which have of recent years occurred in the nominated portion of the present Legislative Council of Canada, go far to show that, even in the ordinary course of events, the succession of Members will be rapid. I have received on this subject a Return which will be interesting. In 1856, forty-two Members answered to the call of the House; in 1858 there were but thirty-five, and in 1862 only twenty-five. Thus in six years no less than seventeen vacancies had occurred, showing an average of nearly three every year. When, therefore, a power on the part of the Crown to create six additional Members is supplemented by so large and so regular a change in the constitution of the Senate, it may be hoped that enough is done to maintain the Legislative harmony of the two Houses.

Your Lordships will observe that by the 25th clause security is given that the first list of Senators shall not be nominated under partisan influences. Their names will be a matter of careful agreement, to be submitted to and confirmed by the Crown, and to form part of the Proclamation of Union. The qualifications which are annexed to the office of Senator are not numerous, but they are important. He is to be of thirty years of age—and probably the average age will considerably exceed this—he must be a subject of Her Majesty—he must have a continuous real property qualification of 4,000 dollars over and above all debts and liabilities, and a continuous residence in the Province which he represents. On the other hand, he will become subject to disqualification if he fails in his attendance for two consecutive Sessions, if he takes an oath of allegiance to any foreign Power, if he is insolvent or convicted of crime, or if he ceases to be qualified in respect either of his property or his residence in his Province. There are some further details of procedure which are provided for, but which only need a general mention. The Speaker will be nominated by the Governor General on the part of the Crown, a quorum of fifteen will be required, and whenever the Members present are equally divided, the presumption—in imitation of the rule of this House—will be for the negative.

I now come to the constitution of the House of Commons. The principle upon which the Senate is constructed is, as I have explained, the representation and the protection of sectional interests. The principle upon which the House of Commons is founded is that of a representation in accordance with population. It will not be, indeed, a representation of mere numbers distributed equally in electoral districts; but whilst population is made the basis of representation, each Province will have its own number of representatives in proportion to their own population, and in proportion also to the population and representatives conjoined of their neighbours. Unlike other popular Assemblies, the Canadian House of Commons will be a variable number; but it will vary by reference to a particular standard. That standard will be given by Lower Canada, which is to retain its present quota of sixty-five Members, and will in fact be the proportion which those sixty-five Members bear to the population of the Province. If Lower Canada, with a population of 1,100,000, has sixty-five Members, Upper Canada, with a population of nearly 1,500,000, will have eighty-two Members. It may, indeed, happen that an increase of the total numbers of the House may become necessary. Power is reserved for this contingency; but in such case the increase will be regulated in all the other Provinces by reference to the number of Members representing Lower Canada, and by the proportion between those Members and the population in that Province. But as the representation of population will be based upon the census, there will be a decennial re-adjustment of it. And this leads me to observe that the Parliaments of British North America will be quinquennial. That decision was not, I believe, adopted without some debate. On the one side there was the precedent of the English Constitution; on the other, there was the example of the recent New Zealand Constitution, and the fact that the average duration of British Parliaments can hardly in recent times be said to exceed five years. Of the twenty-one Parliaments from the accession of George I. to that of William IV., comprising a period of 115 years, the average duration was under five years and a half; and of the ten Parliaments from the accession of William IV. to 1865, comprising a period of thirty-five years, the average duration has been three years and a half. Whilst in the last century no less than seven Parliaments attained the term of six years, in the present only two Parliaments have had so protracted an existence.

The Local Legislatures to be established in each Province stand next in order; and my task here is easy; for whilst the provisions regulating the constitution of the central Parliament are in the nature of permanent enactments, those which govern the Local Legislatures will be subject to amendment by those bodies. This portion, therefore, of the Bill is intended to provide the temporary machinery by which each Province will be enabled to enter upon its new life and political duties. I ought, however, to observe that in Nova Scotia and New Brunswick no material change will take place. The existing Parliaments in those provinces become the Provincial Legislatures, with their constitutions, their constituencies, and their local machinery unaltered. In Canada, the division of the Province has necessitated the creation of two Legislatures; but the clauses that provide for them are little more than a transcript of a vote agreed to by the Canadian Parliament in their last Session, in anticipation of this adjustment. In Lower Canada there will be a Legislative Council, of which the Members will be nominated for life, and an Assembly: in Upper Canada there will be but one Chamber for the management of local business.

My Lords, I now pass to that which is, perhaps, the most delicate and the most important part of this measure—the distribution of powers between the Central Parliament and the local authorities. In this is, I think, comprised the main theory and constitution of Federal Government; on this depends the practical working of the new system. And here we navigate a sea of difficulties. There are rocks on the right hand and on the left. If, on the one hand, the Central Government be too strong, then there is risk that it may absorb the local action and that wholesome self-government by the provincial bodies, which it is a matter both of good faith, and political expediency to maintain: if, on the other hand, the Central Government is not strong enough, then arises a conflict of State rights and pretensions, cohesion is destroyed, and the effective vigour of the central authority is encroached upon. The real object which we have in view is to give to the Central Government those high functions and almost sovereign powers by which general principles and uniformity of legislation may be secured in those questions that are of common import to all the Provinces; and, at the same time, to retain for each Province so ample a measure of municipal liberty and self-government as will allow and indeed compel them to exercise those local powers which they can exercise with great advantage to the community. In Australia there is at present a tendency towards the disintegration of the vast territories which are called colonies, because those who live at great distances on their extreme borders complain that they cannot obtain from the Central Parliaments the attention which they require. In New Zealand, on the other hand, an attempt—and not without success—has been made to combine considerable local powers with a general Government at the centre.

In this Bill the division of powers has been mainly effected by a distinct classification. That classification is fourfold. 1st, those subjects o[illegible]islation which are attributed to the Ce[illegible] Parliament exclusively; 2nd, those which belong to the Provincial Legislatures exclusively; 3rd, those which are subjects of concurrent legislation; and 4th, a particular question which is dealt with exceptionally. To the Central Parliament belong all questions of the public debt or property, all regulations with regard to trade or commerce, customs and excise, loans, the raising of revenue by any mode or system of taxation, all provisions as to currency, coinage, banking, postal arrangements, the regulation of the census, and the issue and collection of statistics. To the Central Parliament will also be assigned the enactment of criminal law. The administration of it indeed is vested in the local authorities; but the power of general legislation is very properly reserved for the Central Parliament. And in this I cannot but note a wise departure from the system pursued in the United States, where each State is competent to deal as it may please with its criminal code, and where an offence may be visited with one penalty in the State of New York, and with another in the State of Virginia. The system here proposed is, I believe, a better and safer one; and I trust that before very long the criminal law of the four Provinces may be assimilated—and assimilated, I will add, upon the basis of English procedure. Lastly, the fisheries, the navigation and shipping, the quarantine regulations, the lighting of the coast, and the general question of naval and military defence, will be placed under the exclusive control of the Central Government.

The principal subjects reserved to the Local Legislatures are the sale and management of the public lands, the control of their hospitals, asylums, charitable and municipal institutions, and the raising of money by means of direct taxation. The several Provinces, which are now free to raise a revenue as they may think fit, surrender to the Central Parliament all powers under this head except that of direct taxation. Lastly, and in conformity with all recent colonial legislation, the Provincial

Legislatures are empowered to amend their own constitutions. But there is, as I have said, a concurrent power of legislation to be exercised by the Central and the Local Parliaments. It extends over three separate subjects—immigration, agriculture, public works. Of these the two first will in most cases probably be treated by the Provincial authorities. They are subjects which in their ordinary character are local; but it is possible that they may have, under the changing circumstances of a young country, a more general bearing, and therefore a discretionary power of interference is wisely reserved to the Central Parliament. Public works fall into two classes: First, those which are purely local, such as roads and bridges, and municipal buildings—and these belong not only as a matter of right, but also as a matter of duty, to the local authorities. Secondly, there are public works which, though possibly situated in a single Province, such as telegraphs, and canals, and railways, are yet of common import and value to the entire Confederation, and over these it is clearly right that the Central Government should exercise a controlling authority.

Lastly, in the 93rd clause, which contains the exceptional provisions to which I referred, your Lordships will observe some rather complicated arrangements in reference to education. I need hardly say that that great question gives rise to nearly as much earnestness and division of opinion on that as on this side of the Atlantic. This clause has been framed after long and anxious controversy, in which all parties have been represented, and on conditions to which all have given their consent. It is an understanding which, as it only concerns the local interests affected, is not one that Parliament would be willing to disturb, even if in the opinion of Parliament it were susceptible of amendment; but I am bound to add, as the expression of my own opinion, that the terms of the agreement appear to me to be equitable and judicious. For the object of the clause is to secure to the religious minority of one Province the same rights, privileges, and protection, which the religious minority of another Province may enjoy. The Roman Catholic minority of Upper Canada, the Protestant minority of Lower Canada, and the Roman Catholic minority of the Maritime Provinces, will thus stand on a footing of entire equality. But in the event of any wrong at the hand of the local majority, the minority have a right of appeal to the Governor General in Council, and may claim the application of any remedial laws that may be necessary from the Central Parliament of the Confederation.

In closing my observations upon the distribution of powers, I ought to point out that just as the authority of the Central Parliament will prevail whenever it may come into conflict with the Local Legislatures, so the residue of legislation, if any, unprovided for in the specific classification which I have explained, will belong to the central body. It will be seen, under the 91st clause, that the classification is not intended "to restrict the generality" of the powers previously given to the Central Parliament, and that those powers extend to all laws made "for the peace, order, and good government" of the Confederation—terms which, according to all precedent, will, I understand, carry with them an ample measure of legislative authority. I will add, that whilst all general Acts will follow the usual conditions of colonial legislation, and will be confirmed, disallowed, or reserved for Her Majesty's pleasure by the Governor General, the Acts passed by the Local Legislature will be transmitted only to the Governor General, and be subject to disallowance by him within the space of one twelvemonth.

Clauses 102-126 regulate the conditions, pecuniary, and commercial, upon which the Provinces enter into union. They are so entirely matter of local detail and agreement, that I need not weary the House with any minute statement of them. It is enough to say that under them a consolidated fund is created, and that whilst lands and minerals are reserved to the several Provinces, the assets, property, debts, and liabilities of each will be transferred to the central body. By this agreement the public creditor who exchanges the security of each separate Province for the joint security of the four Provinces confederated, will find his position improved rather than deteriorated. As between the Provinces, it is proposed that the Local Legislatures should surrender to the Central Parliament all powers of raising revenue except by direct taxation. In return for this concession the Central Government will remit to the Local Legislatures certain fixed sums and a proportionate capitation payment, in order to enable them more conveniently to defray the costs of local administration. The debt of each Province has been fixed at a certain sum calculated; but if in the interval between the present time and the proclamation of Union that debt should be increased, the Province so exceeding will pay interest on the excess, and that interest will be deducted from the quota which they would otherwise receive from the central authority. In the same category must be placed the 145th clause, which makes it the duty of the Central Parliament and Government to provide for the commencement of the Intercolonial Railway within six months of the union. Such an undertaking was part of the compact between the several Provinces, and it was an indispensable condition on the part of New Brunswick. Successive Governments at home have entertained the scheme and have pledged themselves to the promise of more or less assistance. Meanwhile I will not now enter upon its details, because very shortly a further measure involving the consideration of pecuniary support must come before Parliament.

There is, indeed, a question of great importance and intimately connected with the future fortunes of the Confederated Provinces, and I may perhaps be asked why it finds no place in this measure. My Lords, I am fully alive to the urgent importance of coming to some settlement of the Hudson Bay Company's claims. The progress of American colonization on the West, the Confederation of the Provinces on the East, render an early decision necessary. But till this union is completed it would be a waste of time to discuss the relations of the Hudson Bay Company's territories to the Provinces. When once this Bill becomes law, it will be the duty of Her Majesty's Government not to lose one day unnecessarily in dealing with this great subject.

Having thus stated the main provisions of this measure, I have only to add the designation of this new State to which we are about to give a distinct life and organization. It may seem a trifling question; but it has, in truth, been one neither unimportant nor free from difficulties. To the representatives of the Maritime Provinces belongs the credit of waiving local rights and pretensions; and they have felt the advantage of accepting a name not less familiar to the English labourer and artizan than it is distinguished by honourable traditions. Her Majesty has been pleased to express her approval of the name, and henceforth the United Provinces will be known as the "Dominion of Canada"—a designation which is a graceful tribute on the part of colonists to the monarchical principle under which they have lived and prospered, and which they trust to transmit unimpaired to their children's children. Whilst the individual Provinces of Nova Scotia and New Brunswick retain their present designation, Upper Canada will become the Province of Ontario, and Lower Canada the Province of Quebec.

I have now stated the general principles upon which this measure is founded. But to so large a scheme, as might naturally be expected, objections have been made; and these objections, or some of them, it is my duty to indicate. And first, it has been urged that this Union should have been a legislative rather than a federal one. I admit, to a certain extent, the validity of the objection. When Upper and Lower Canada where connected in a legislative Union, Lord Durham distinctly contemplated a similar incorporation of the Maritime Provinces. Nor are there wanting to this opinion many of the ablest of Canadian statesmen. But the answer is simply this—that a legislative Union is, under existing circumstances, impracticable. The Maritime Provinces are ill-disposed to surrender their separate life, and to merge their individuality in the political organization of the general body. It is in their case impossible, even if it were desirable, by a stroke of the pen to bring about a complete assimilation of their institutions to those of their neighbours. Lower Canada, too, is jealous, as she is deservedly proud, of her ancestral customs and traditions; she is wedded to her peculiar institutions, and will enter this Union only upon the distinct understanding that she retains them. The 42nd Article of the Treaty of Capitulation in 1760, when Canada was ceded by the Marquis de Vaudreuil to General Amhurst, runs thus—

> "Les François et Canadiens continueront d'être gouvernés suivant la Coutume de Paris et les loix et usages établis pour ce pays."

The Coutume de Paris is still the accepted basis of their Civil Code, and their national institutions have been alike respected by their fellow-subjects and cherished by themselves. And it is with these feelings and on these terms that Lower Canada now consents to enter this Confederation.

But it has been objected that this union of Provinces will be a kingdom, not a Confederation, and that being an embodiment of the monarchical principle, it will constitute a challenge, to our powerful republican neighbour across the border. Now I am a loss to understand how these Provinces, when united, can be one whit more or whit less of a kingdom than when separate. There will be, with some few modifications, the same institutions, the same forms of government, and even the same men to give life and movement to them. It is but a development of the existing system. But whilst it is attacked by one critic as too monarchical in its character, it is assailed by another as too Republican, and we are warned that it must ere long on American soil become a Republic, and lead to the dismemberment of the Empire. Now I do not see special cause for apprehension from republican any more than from monarchical dangers; but I must submit that, at all events, the two allegations are fatally inconsistent with each other.

Again, it has been said that this great scheme owes its origin to the lust of territorial dominion on the part of one State, and that it is solely referable to the overweening ambition of Canada to exercise a supremacy over her sister Provinces. For this allegation I cannot see the smallest groundwork of argument; and, looking to the past history and the ordinary probabilities of these colonies, I can conceive nothing more unlikely than a combination of Upper and Lower Canada as against the Maritime Provinces. If, indeed, any one of these Provinces has a reasonable ground for apprehension, it is Lower Canada, with its distinct race and language and institutions, rather than Nova Scotia and New Brunswick, which are in all essentials so akin to the great and populous Province of Upper Canada. But whilst this large scheme of union has been attributed to the desire of political supremacy on the part of Canada, it is in the same breath referred to the irreconcilable differences which are supposed to have divided Upper and Lower Canada. I believe, for my own part, that those differences have been greatly exaggerated; but anyhow it is clear that the two objections cannot both be correct. They destroy each other. And this, indeed, I may observe, is the case with several other objections that have been urged; as when, in England, we are told that the object of this scheme is the imposition of fresh burdens upon the mother country, and, in America, that its object will be the imposition of pecuniary charges upon the Maritime Provinces.

My Lords, I must not pass over another and a plausible objection to the policy of this measure. It is said that, whilst the commercial policy of Canada has been of a Protectionist, that of the Maritime Provinces has been of a more Liberal character; and it is further argued that, when once the union of these Provinces shall be accomplished, the restrictive system of Canada will become uniform, and that we shall find ourselves excluded from the comparatively free markets which we have hitherto enjoyed. A Canadian would probably reply to this that the high tariff of Canada has been due to the necessities of the revenue rather than to a desire to foster her own industry. Of this we can be no judge; we can only accept the facts as we find them; but on those facts there is, as I think, an answer worthy of the attention of this House. Whatever may have formerly been the case, it is now unfair to draw a strong distinction between the commercial policies of Canada and of the Lower Provinces. Canada is by no means unanimous in her desire for Protectionist measures. On the contrary, the Canadian tariff has recently been brought into far greater harmony with that of this country. I understand that the duties on all manufactured articles—such as cottons, woollens, and leather—have been reduced in some cases from 25, but in all from 20 to 15 per cent. Partially-manufactured articles—such as bar-iron, tin, &c., which were formerly charged with a 10 per cent duty—now come in free; and lastly, all raw materials are exempt from duty. On the other hand, the reductions in the revenue due to these changes have been made good by stamps, by an increase of the Excise, and by duties on tea, sugar, and wines. Of these I may mention that the duty on tea is 4½*d* per lb., and therefore very close upon that which exists here; that as regards sugar, they have adopted the same duties and the same system; whilst in the case of wines they have followed the same system, with this difference, that their duties are 60 per cent lower than our own. Such, indeed, has been the reduction effected, that the Canadian tariff, whilst still considerably in excess of the Nova Scotian, is less than that of New Brunswick. And, therefore, we have some right to hope that a Free Trade rather than a Protectionist policy will be the result of the union of Canada with the Lower Provinces. But if even it were otherwise, I could never ask this House to bargain with Canada, and to withhold its consent to a measure on which the hearts of our colonists and fellow-subjects are set, until they had adjusted their tariff to our liking. We must rather trust to time and the prevailing strength of our own commercial principles to induce the

Provinces to adopt that view which is most consistent with our policy, and, as I believe, with their interests. I do not doubt what their choice will be; for, apart from other considerations, so long as the United States think it desirable to hem themselves in with the bounties and restrictions of a jealously protective system, so long it will be the obvious interest of British North America to open her ports to the free entrance of commerce.

I have now come to the last, but also the gravest, objection which has been raised. It is an objection which I cannot indeed admit, but to which I will endeavour to do justice. It is represented that this measure, which purports to rest upon the free consent of the various contracting parties, is distasteful to a large portion, if not a majority, of the inhabitants of Nova Scotia. My Lords, it has been the duty of Her Majesty's Government to weigh seriously the value of this objection. I am told that a petition will be presented in the House of Commons; but none has been laid, or, as far as I know, will be laid, on the table of this House. There are, however, petitions against this union, which will be found in the recent papers that have been presented to Parliament. They are often drawn up with considerable ability; but they bear the mark, I think, of a single hand, and, though they profess to emanate from public meetings in the different counties of Nova Scotia, they are—I believe, with one exception—signed by the Chairman alone, and give no evidence of the number or the class of the petitioners. As against this, we have to consider, first, that both Upper and Lower Canada have—I may almost say unanimously—expressed their concurrence in the proposed Confederation; and that New Brunswick has given in her formal adhesion. And what as to Nova Scotia? Why, in 1861, the Assembly of that Province agreed to a resolution in favour of Confederation in general terms, and that resolution was transmitted to the Home Government. In 1863 the Nova Scotian Legislature was dissolved, and the Parliament then returned is still in existence. That Parliament, last summer, agreed to a vote in favour of Confederation in most definite and yet comprehensive terms, empowering the delegates now in this country to negotiate with Her Majesty's Government the conditions of Union. My Lords, I do not see how it is possible to look behind that vote, and what better guarantee we can have of the real feelings of the people of Nova Scotia. I cannot, after this, consent to enter upon a discussion of the motives or policy of this or that Colonial Minister. We have not the materials for forming a judgment; we can only accept the deliberate and formal opinion of the Legislature as the expression of the public feeling. Nor are the delegates, who are now in England, men selected from any one party in the Province. They represent both the Colonial Government and the Colonial Opposition. But, then, I may be told that the opposition is not so much to the measure itself as to the time at which it is being passed; and that the opponents desire that its ratification should be deferred until a new Parliament in Nova Scotia shall have expressed its opinion upon the question. But my answer to this must be, that the present Nova Scotian Parliament is fully competent to deal with the subject. Its members are representatives, not delegates, of the constituencies. When, last year, the Legislature of Jamaica voted away the former constitution of the island, Parliament did not hesitate to accept that surrender, and to place the colony under the direct control of the Crown. Neither the people nor the Legislature of Nova Scotia have been taken by surprise. Ever since 1858 the question of a more intimate consolidation of Provincial interests has been before the public mind. The plea for delay is in reality a plea for indefinite postponement, and to this I do not believe that Parliament will lend its ear. This measure has been purchased at the cost of great personal and local interests, and if we now remit it—I care not on what pretence—to the further consideration of the Province, we deliberately invite opposition; and we may be sure that many years will pass over before another such proposal for Confederation is submitted to Parliament.

My Lords, these objections come too late, for it is not the question of one, but of four great Provinces. If, indeed, we were to wait till every individual in those Provinces were agreed, we might wait for ever. To such a scheme as this there must, in the nature of things, be opposition. If ever the union of two countries was of public benefit, it was the union of Scotland and England; and yet when every circumstance of the time called imperatively for that union there were many who hesitated. The calmest and most philosophic of modern historians has said that—

> "The measure was so hazardous an experiment, that every lover of his country must have consented to it in trembling, or revolted from it in disgust."

That union was, nevertheless, accomplished, and so fraught with blessings has it been, that we now wonder that the two nations could so long have remained separate.

I have thus stated some of the principal objections which have been urged to this measure, and have briefly indicated the answers to them. Let me now review some of the advantages which may be reasonably anticipated. And first, I hope that this measure may well and effectually compose some of those complaints which from time to time must arise out of such an union as that which at present subsists between Upper and Lower Canada. It has, for instance, been said, that whilst Upper Canada possesses the largest population, she has only an equal voice in the representation of their common interests in the joint Legislature. But this inequality will be redressed by the principle of representation according to population, upon which the House of Commons is to be constituted. Nor will Upper Canada gain unduly by this arrangement; for whilst her interests will be protected by a representation in accordance with population in the Lower House, the interests of Lower Canada will be guarded by an equality of the sectional votes in the Upper House. Again, it has been said that whilst Upper Canada contributes the larger share of taxation, Lower Canada enjoys more than her just portion of the public expenditure. That allegation, whether well or ill-founded, also finds its answer in this Bill. Henceforward, apart from the revenue raised for the common purposes of the Confederation, local taxation and expenditure will depend upon the local authorities. Thus, all those complaints which must arise under the circumstances of such an union as that which now exists—complaints of partiality, of neglect, of mismanagement of roads, bridges, and those public works which are the very life of a young community, must cease. All local works will devolve upon local authorities, who in turn will be responsible to the taxpayers. This is, indeed, the principle which we recognise in the management of our own county and borough affairs; and if it should be said that Parliament undertakes a wider control in England than is contemplated by this Bill in the confederated Provinces, I reply first, that there is a difference in the management of local affairs by a central body between a country which contains 100,000 square miles, and one which now contains 400,000, and may one day contain 3,400,000 square miles; and, secondly, that the lesson, which the English Parliament affords us in this matter, is a lesson rather of warning than of encouragement. These are perhaps negative merits. For the positive advantages, let anyone look at the map and observe how bountifully nature has lavished her gifts upon that country. But nature, true to her constant rule, does not there shower those gifts upon one part to the exclusion of another. In the Eastern districts there are not only coasts indented with harbours and fisheries, which, unless man greatly misuse them, may be called inexhaustible, but minerals, gold, and—that which is more precious than gold—rich beds of coal. As the traveller goes westward, he finds a country rich in timber, in grain, in iron, lead, and copper, a country well fitted for manufacturing prosperity, and already known for its breed of sheep, and cattle, and horses; and when he passes the westernmost frontier of Canada, he sees before him fertile plains as yet unsettled, stretching along the valley of the Saskatchewan, up to the roots of the rocky mountains. Now these districts, which it may almost be said that nature designed as one, men have divided into many by artificial lines of separation. The Maritime Provinces need the agricultural products and the manufacturing skill of Canada, and Canada needs harbours on the coast and a connection with the sea. That connection, indeed, she has, during the summer, by one of the noblest highways that a nation could desire, the broad stream of the St. Lawrence; but in winter henceforth she will have it by the intercolonial railway. At present there is but a scanty interchange of the manufacturing, mining, and agricultural resources of these several Provinces. They stand to each other almost in the relation of foreign States. Hostile Custom Houses guard the frontiers, and adverse tariffs choke up the channels of intercolonial trade. There is no uniformity of banking, no common system of weights and measures, no identity of postal arrangements. The very currencies differ. In Canada the pound or the dollar are legal tender. In Nova Scotia the Peruvian, Mexican, Columbian dollars are all legal; in New Brunswick, British and American coins are recognised by law, though I believe that the shilling is taken at twenty-four cents, which is less than its value; in Newfoundland Peruvian, Mexican, Columbian, old Spanish dollars, are all equally legal; whilst in Prince Edward's Island the complexity of currencies and of their relative value is even greater. Such then being the case, I can hardly understand that any one should seriously dispute the advantage of consolidating these different resources, and interests, and incidents of government under one common and manageable system.

But there is yet another advantage to be gained from that union, to which I must call the attention of the House. The question of military defence is a somewhat delicate one on which to touch. Military defence supposes war, and war in that part of the world could only be with that great Republic which lies south of our border. Such a war between men of a common race and language, and in many respects of common institutions, would be an unnatural and detestable conflict, which would entail upon each incalculable injuries, and perhaps throw back for years the course of civilization and human prosperity. It is, however, our duty in dealing with this great question to deal with it fully, and not to evade a consideration so important as that of military defence. We are constantly reminded of the difficulties of defending the long frontier of Canada with a distant base of operations. Every reasonable man will admit those difficulties; nor do I see any object in underrating them. At the same time, we have high and competent military authority to warrant us in believing that, with proper precautions and with the spirit of courage and loyalty which has animated the Canadian people, the defence of Canada is no insoluble problem. Again, we are told that the proportions of military expenditure are not fairly adjusted between the mother country and Canada. Well, I think that the time has probably come for a re-consideration of those charges; and to that opinion there are many in Canada who will subscribe. I am confident that Canada desires only that which is reasonable, that which she may in honour ask, and in honour accept of this country. There has been a good deal of misunderstanding on this subject, and Canada has been supposed to be backward in defraying the expenses of her own defence. But out of the 425,000 militia who are on paper, 90,000 have six days' drill in the year; and that besides these, there are from 30,000 to 35,000 Volunteers, who have undergone considerable training, and have attained much efficiency. There are drill associations in the various towns; there have been camps of instruction, and more than 3,000 cadets have within the last two years passed an examination by the military authorities, and have received certificates either of the first or second class. I will only add, that whilst the military expenditure in Canada was in 1864 about 300,000 dollars, it was in 1865 nearly 900,000 dollars, and in 1866 more than 2,000,000 dollars. By the Census of 1861, it was computed that the men between the ages of twenty and sixty, supposed to be capable of bearing arms, were—

In Upper Canada . . .	308,000
„ Lower Canada . . .	225,000
„ Nova Scotia . . .	67,000
„ New Brunswick . . .	51,000
	651,000

These are now fixed to their respective Provinces, and engaged, as a matter both of duty and sentiment, to the exclusive defence of that Province. But when Confederation is accomplished these scattered forces will become one army under the command and, in the event of emergency, at the disposal of one single general.

But if the advantages of union are great in a military, a commercial, a material point of view, they are not, I think, less in the moral and political aspect of the question. When once existing restrictions are removed, and the schools, the law courts, the professions, the industries of these great Provinces are thrown open from one end to another, depend upon it a stimulus greater than any that has ever been known before in British North America will be applied to every form of mental or moral energy. Nor will it be the main body of the people that will alone feel this. The tone of Parliament, the standard of the Government will necessarily rise. Colonial institutions are framed upon the model of England. But English institutions, as we all know, need to be of a certain size. Public opinion is the basis of Parliamentary life; and the first condition of public opinion is that it should move in no contracted circle. It would not be difficult to show that almost in proportion to its narrowness Colonial Governments have been subject to disturbing influences. But now, independently of the fact that in these confederated Provinces there will henceforth be a larger material whence an adequate supply of colonial administrations and colonial oppositions can be drawn, it is not, I think, unreasonable to hope that, just as the sphere of action is enlarged.

[☞ T 9, p. 576 *a follows.*

the vestry element will be discarded, large questions will be discussed with the gravity which belongs to them, men will rise to a full sense of their position as Members of a great Parliament, and will transmit their own sense of increased responsibility and self-respect through Parliament and the Government to the main body of the people.

My Lords, I have now touched upon the main features of this measure. I have only in conclusion to say a few words as to the principle upon which it is founded. I know that objections are sometimes made to the principle of a federative Government. It is true that no federation can be as compact as a single homogeneous State, though the compactness will vary with the strength or weakness of the Central Government. It is true that federation may be comparatively a loose bond, but the alternative is no bond at all. It is not every nation, or every stage of the national existence, that admits of a federative Government. Federation is only possible under certain conditions, when the States to be federated are so far akin that they can be united, and yet so far dissimilar that they cannot be fused into one single body politic. And this I believe to be the present condition of the Provinces of British North America. Again, it is said that federation is a compromise, and, like all compromises, contains the germ of future disunion. It is true that it is a compromise, so far as it is founded upon the consent of the Provinces; it is true that it has been rendered possible by the surrender of certain powers, rights, and pretensions by the several Provinces into the hands of the central authority; but it is also to be remembered that—unlike every other federation that has existed—it derives its political existence from an external authority, from that which is the recognised source of power and right — the British Crown. And I cannot but recognise in this some security against those conflicts of State rights and central authority which in other federations have sometimes proved so disastrous.

There have been but few examples of federative Governments. Republics and kingdoms there have been many that have played great parts; but the federative Governments in the world's history may be easily counted. There have been but four which can be fairly called famous. Two are no more—two exist. Of these, one—Switzerland—is the smallest amongst the families of modern Europe; the other—the United States—is one of the greatest of the Great Powers of the world. In geographical area this Confederation of the British North American Provinces is even now large—it may become one day second only in extent to the vast territories of Russia—and in population, in revenue, in trade, in shipping, it is superior to the thirteen colonies when, not a century ago, in the Declaration of Independence, they became the United States of America. We are laying the foundation of a great State—perhaps one which at a future day may even overshadow this country. But, come what may, we shall rejoice that we have shown neither indifference to their wishes nor jealousy of their aspirations, but that we honestly and sincerely, to the utmost of our power and knowledge, fostered their growth, recognising in it the conditions of our own greatness. We are in this measure setting the crown to the free institutions which more than a quarter of a century ago we gave them, and therein we remove, as I firmly believe, all possibilities of future jealousy or misunderstanding—

"*Magna* sub ingenti Matris se subjicit umbrâ."

Moved, "That the Bill be now read 2ª."—(*The Earl of Carnarvon.*)

THE MARQUESS OF NORMANBY said, the noble Earl the Secretary for the Colonies had so exhausted the subject that it was unnecessary to add but a few remarks to what had been said already. He should, therefore, confine his observations to the military advantages which he believed this union was calculated to confer on the North American Provinces, and answer some of the objections that had been made to the scheme in Nova Scotia. Some people in this country were of opinion that England derived no benefit from these colonies; that they were rather a source of burden and expense, and that there was consequently no need for maintaining the close connection at present existing between them and the mother country. That was not the feeling with which he intended to address himself to this subject; nor was it the feeling of the vast majority of the people in this country, nor of their Lordships, nor of the colonists themselves. Were the British North American colonies in a position to stand alone—were they anxious or willing for separation from this country, were their feelings or inclinations such as to lead them to seek amalgamation with the United States—he did not think that it would be wise for us to use coercive measures to prevent